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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 460

RHEDEREI M. JEBSEN COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 13, 1924

(30,425)

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

RHEDEREI M. JEBSEN COMPANY

v.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On June 29, 1923, the plaintiff filed its original petition.

On Nov. 19, 1923, on motion made therefor, the defendant was allowed to withdraw the general traverse and file a demurrer to said petition.

Defendant's demurrer was filed Nov. 21, 1923.

On February 19, 1924, on motion made therefor in open court, plaintiff was allowed to file an amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed February 19, 1924

To the Honorable the Court of Claims:

The Claimant respectfully represents:

1. That Rhederei M. Jebsen Company was a duly organized and incorporated joint stock company under the laws of Schleswig-Holstein, Germany, and registered at the port of Apenrade, prior to the outbreak of the European War; that, in accordance with the provisions of the Treaty of Versailles and the plebiscite held thereunder, the said city of Apenrade and the province of Schleswig-Holstein [fol. 2] became a part of the kingdom of Denmark, and claimant is now an incorporated joint stock company under the laws of said kingdom.

2. That at the outbreak of the war in Europe in 1914, the said company then owned and had in commission an eighteen hundred ton merchant steamship known as the Johanne, of the gross tonnage of 1,530.88 register tons, net tonnage of 952.06, length of 77.96 meters, breadth 11.03 meters, and depth 5.51 meters, and built at Lubeck, Germany, in 1903. When war was declared between Germany and France and the other allied powers, the said steamship took refuge in the harbor at Manila, Philippine Islands, and remained there until the same was seized by the Government, as hereinafter set forth.

3. On information and belief, claimant alleges that on the date of the Declaration of War by the Congress of the United States against Germany, or within a few days thereafter, the said steamship Johanne, then in the harbor at Manila Bay, was seized, held and prevented from fully departing by the United States Government, by

its officers and agents, as the property of M. Jebsen, and held and used by said Government until the title was taken over as hereinafter alleged.

4. That on the 30th of June, 1917, Woodrow Wilson, as President of the United States, issued an executive order pursuant to the provisions of the Joint Resolution of Congress, approved May 12, 1917, wherein and whereby he ordered the United States Shipping Board to take over the possession and title of the steamship Johanne, a copy of which executive order is attached hereto and marked Exhibit "A," and by reference made a part of this petition. That a few days thereafter, the United States Shipping Board, pursuant [fol. 3] to said order, took possession of, and the title to, the said Johanne, then anchored at Manila Bay, in the Philippine Islands.

5. That thereafter, on December 12, 1917, the United States Shipping Board chartered said vessel to the Philippine Government, in whose service it remained until March 15, 1920, when the said Shipping Board, pursuant to the authority conferred upon it by law, sold and conveyed the said steamship Johanne to E. D. Aaby of Christiana, Norway for the sum of one hundred and seventy-four thousand six hundred ($174,600) dollars.

6. Claimant alleges that when the possession and title was taken over by the President and the Shipping Board, pursuant to the Joint Resolution of Congress, passed May 12, 1917 (40 Stat. L. 75), as aforesaid, an implied promise and agreement was made by the United States Government to pay to the owner of said vessel just compensation therefor. That said steamship Johanne, when seized by the United States Government, as aforesaid, was owned by claimant, and was reasonably worth the sum of one hundred and seventy-four thousand six hundred ($174,600) dollars.

7. That the reasonable value of the use of said vessel from April 6, 1917, to June 30, 1917, when the title was taken over as aforesaid, was the sum of twenty-three thousand ($23,000) dollars; and the defendant is justly indebted to the claimant for the use of said vessel in that sum.

8. Claimant is not advised as to whether or not the Secretary of the Navy appointed a Board of Survey to ascertain the value of said vessel at the time it was taken, and is unable to state whether or not any report of such value was made to the Secretary of the Navy.

[fol. 4] 9. No claim has ever been filed with the Shipping Board, or any other department of the Government, and claimant has not been paid the value of said vessel or any part thereof, nor for its use by this Government. No action has been taken with respect to said claim in Congress or any of the executive departments of the Government, and no suit has been brought on this claim in any other court.

10. Sometime after the seizure of the Johanne the name of said vessel was changed to "Iosco."

11. Claimant is the sole owner of the claim set forth in this petition. No assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, and claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that the claimant is a citizen of the kingdom of Denmark, which accords to citizens of the United States the right to prosecute claims in its courts, and therefore has the privilege of prosecuting this claim.

Wherefore, claimant prays for a judgment in his favor against the United States, in the sum of one hundred and ninety-seven thousand six hundred dollars ($197,600) and for such other and further relief as to this Honorable Court may seem just and equitable.

H. H. McCormick, Attorney for Plaintiff. Daniel R. Williams, T. T. Ansberry, George T. Farrell, W. F. Norman, of Counsel.

[fol. 5] UNITED STATES OF AMERICA,
District of Columbia, ss:

H. H. McCormick, being duly sworn, says that he is attorney for the plaintiff above-named, duly authorized in the premises. That the plaintiff is a non-resident of this country, and now absent therefrom. That affiant is familiar with the facts on which the said claim is founded; and that the allegations set forth in the foregoing petition are true, as he verily believes.

H. H. McCormick.

Subscribed and sworn to before me this 19th day of Feby., 1924. F. C. Kleinschmidt, Asst. Clerk, Court of Claims. (Seal.)

EXHIBIT "A" EXECUTIVE ORDER

Whereas the following Joint Resolution adopted by Congress was approved by the President May 12, 1917:

"Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin [fol. 6] Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen or sub-

ject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the Government to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized and directed to appoint, subject to the approval of the President a board of survey whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These finding shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas the following vessels were, at the time of coming into the jurisdiction of the United States owned in whole or in part by a corporation, citizen or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

Vaterland
Amerika
Kaiser Wilhelm II
President Grant
Pennsylvania
Bulgaria
[fol. 7] Princess Irene
Hamburg
Neckar
Bohemia
Rhaetia
Wittekind
Armenia
Adamsturm
Willehad
Serapis
Allemannia
Nassovia
Maia
Arnoldus Vinnen
Ottawa
Grunewald
Sachsenwald
Staatssekretar Solf
Arca (Lighter)
George Washington
Neptun
O. J. D. Ahlers
Prinz Waldemar
Loongmoon
Governor Jaeschke
Darvel
Princess Alice
Wiegand
Bochum
Carl Diederichsen
Coblenz
Esslingen
Lyeemoon
Pongtong
Sachsen
Suevia
Steinbeck
Elsass
Indra
Setos
Holsatia
Staatssekretar Kraetke
Borneo
Marudu
Tsintau
Andalusia

Kronprinzessin Cecile	Camilla Rickmers
President Lincoln	Clara Jebsen
Cincinnati	Elmsborn
Grosser Kurfurst	Johanne
Barbarossa	Mark
Friedrich der Grosse	Rajah
Rhein	Sambia
Konig Wilhelm II	Tubingen
Koln	Dalbek
Prinz Oskar	Magdeburg
Ockenfels	Matador
Arcadia	Kurt
Pisa	Andromeda
Prinz Joachim	Prinz Sigismund
Harburg	Savoia
Portonia.	Arni (Lighter)
Clara Mennig	Argus (Lighter)
Pommern	

[fol. 8] It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth.

Woodrow Wilson.

The White House, 30 June, 1917. (No. 2651.)

[fol. 9] III. Defendant's Demurrer—Filed Nov. 21, 1923

(This demurrer was allowed to stand to the amended petition.)

Defendant demurs to the petition in the above-entitled case for the reasons:

First. It fails to state a cause of action against the United States.

Second. It fails to state a cause of action within the jurisdiction of this Court.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Special Assistant to the Attorney General.

IV. Argument and Submission of Demurrer

On February 19 & 20, 1924, the demurrer in this case was argued and submitted by Messrs. Hugh H. McCormick and George T. Far-

rell, for the plaintiff, and by Messrs. W. F. Norris and Herman J. Galloway, for the defendant.

[fol. 10] V. Order of Court Sustaining Demurrer and Dismissing Petition—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is sustained, and the amended petition is dismissed.

By the Court.

VI. Memorandum—Entered by the Court March 17, 1924

The court holds it has not jurisdiction, and its reasons for this holding are stated in the opinion in Deutsch-Australische Dampfschiffs-Gesellschaft Case, No. C-576, decided March 17, 1924. The fact alleged that plaintiff corporation is now a citizen of Denmark does not alter the situation.

[fol. 11] Court of Claims of the United States

[Title omitted]

VII. Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over

of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per dead-weight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 12] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, while at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the

President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 532. In Hvoslef case, [fol. 13] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (67 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case,

257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court [fol. 14] is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Con-

stitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 15] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was en-

acted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had no jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 16] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District

courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 17] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answer this contention. We do not think it necessary to assert that there was a

confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 18] VIII. Plaintiff's Application for Appeal—Filed May 12, 1924

Now comes the plaintiff in the above entitled cause and moves the Court for the allowance of an appeal from the judgment of this Court, entered herein on the 17th day of March, 1924, to the Supreme Court of the United States.

H. H. McCormick, Attorney for Plaintiff.

IX. Order Allowing Plaintiff's Application for Appeal—Entered May 19, 1924

On this 19th day of May, 1924, it is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

[fol. 19] [Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the order of court sustaining the demurrer and dismissing the amended petition and of the memorandum of the court filed therewith; of the opinion of the court referred to in the court's memorandum; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-second day of May, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,425. Court of Claims. Term No. 460. Rhederei M. Jebsen Company, appellant, vs. The United States. Filed June 19th, 1924. File No. 30,425.

(3888)

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924 ~~25~~ 7

No. ~~475~~ 608 ~~25~~ 3

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1924

(30,440)

(30,440)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 475

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] COURT OF CLAIMS OF THE UNITED STATES

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, a Corporation,

vs.

THE UNITED STATES

HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION AND EXHIBITS—Filed Feb. 19, 1924

To the Honorable the Court of Claims:

The claimant, Hamburg-American Line Terminal & Navigation Company, respectfully represents:

1. That claimant is a corporation created by and existing under the laws of the State of New Jersey; that a copy of its Certificate of Incorporation, marked: Exhibit "A," is hereunto annexed and made a part hereof; that it was organized on the twenty-sixth day of October, A. D. 1899, to exercise and perform the powers conferred upon it by said laws and to carry on any business or occupation necessary and proper to effectuate any or all of the objects for which it was formed; that from the date of such organization until a declaration of war by the United States of America against the Imperial German Government on the sixth day of April, A. D. 1917, claimant was a subsidiary corporation of the Hamburg-Ameri-
[fol. 2] kanische Packetfahrt Aktien Gesellschaft, a German corporation engaged in the business of maritime transportation and known commonly in said business as the "Hamburg-American Line," in that all of the issued and outstanding capital stock of claimant was during such period beneficially held for said German corporation; that said stock continued to be held until sometime in or about the month of December, A. D. 1917, when said stock was seized and taken over by the Alien Property Custodian, and has since then been held under the control and management of said Alien Property Custodian, pursuant to the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, the amendments thereto and the Executive Orders issued in pursuance thereof; and that all members of claim-

ant's board of directors, as at present constituted, hold office as such by virtue of their having been regularly elected directors by the vote of the said Alien Property Custodian and his nominees at a stockholders' meeting held at claimant's registered office, No. 15 Exchange Place, Jersey City, New Jersey, on the sixth day of September, A. D. 1922.

2. That many years prior to said sixth day of April, A. D. 1917, claimant by purchase acquired title to and became seized in its demesne as of fee-simple in severalty of certain pieces, parcels, or tracts of land and premises, a part of which lie under water, upon which lands are erected certain piers, warehouses, sheds, office and other buildings and improvements, situated in the city of Hoboken, Hudson County and State of New Jersey, which said lands and [fol. 3] premises are more fully described in "Schedule A" to a Proclamation issued by the President of the United States of America on the third day of December, A. D. 1918 (40 Stat. L., Part 2, pp. 1914-1918), and which said lands and premises on the said sixth day of April, A. D. 1917, had a clear rental value of two thousand and four hundred dollars ($2,400.00) per diem, apportioned as follows, to wit:

Rental of large pier property, per diem.....	$1,000.00
Rental of two smaller piers, @ $500 p. d.....	1,000.00
Rental of bulkheads and buildings, p. d.....	400.00
Total	$2,400.00

3. That on the said sixth day of April, A. D. 1917, the United States of America, acting by and through the War Department, entered upon and took possession and control of said lands and premises, and soon thereafter, to wit: on the twentieth day of April, A. D. 1917, the United States of America, acting as aforesaid, made its possession and control thereof exclusive by ejecting claimant therefrom and depriving claimant for all times thereafter from any further use and occupation of said lands and premises, the Secretary of War, upon directions from the President, having taken possession and assumed control thereof through the Quartermaster General, New York, under authority given by Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645).

4. That the Act of Congress making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public—No. 109—65th Congress), authorized and empowered the President, if he deemed [fol. 4] it necessary for the national security and defense, to acquire the title to said lands and premises and to determine the compensation to be made by the United States therefor.

5. That the President of the United States, acting under the alleged authority vested in him by said Act of Congress approved

March 28, 1918, did, by a Proclamation (40 Stat. L., Part 2, pp. 1804-1805) issued on the twenty-eighth day of June, A. D. 1918, determine and declare that the acquisition of title to claimant's docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson Rier, to wit: in the city of Hoboken, as aforesaid, to be necessary for the National security and defense, and he did thereupon take over for the United States of America the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto, and he did by said Proclamation, issued June 28, 1918, as aforesaid, furthermore declare that just compensation for the property thereby taken over would be thereafter determined and paid.

6. That by said Proclamation, issued December 3, 1918 (40 Stat. L., Part 2, pp. 1914-1918), the President did determine and declare the just compensation to be paid to claimant, for its said property, expropriated for the United States of America, to be the sum of two million three hundred and fourteen thousand eight hundred and seventy-seven dollars ($2,314,877) to be paid to claimant upon the satisfaction of record of all liens by way of mortgage, judgment, or otherwise existing on, and all taxes and assessments [fol. 5] due and exigible upon the foregoing premises, or any part thereof, on the 28th day of June, 1918; and that, thereafter, to wit: on the fifth day of January, A. D. 1919, said sum of $2,314,877.00 was paid by the United States of America to claimant.

7. That notwithstanding the payment to claimant of said sum of $2,314,877.00, as aforesaid, claimant has received no rent or other compensation for the term or time beginning April 6, 1917, when the United States of America entered upon and took possession of claimant's said lands and premises, and ending June 28, 1918, when the United States of America acquired the title to said lands and premises, and, by virtue of the provision contained in the Fifth Amendment to the Constitution of the United States as expressed in the words: "nor shall private property be taken for public use, without just compensation," claimant is justly entitled to have and receive from the United States of America compensation for the use and occupation of its said lands and premises for and during the term or time aforesaid.

8. That claimant founds its claim, on which this suit is brought, upon said Act of August 29, 1916, and upon said provision of the Constitution of the United States, and on an implied contract with the Government of the United States, arising out of the facts herein stated and warranting the inference of an agreement on the part of said Government of the United States to pay to claimant a reasonable price for the use and occupation of its said lands and premises [fol. 6] for the term or time aforesaid, and to compensate claimant further for the time claimant was deprived of the use of said sum

of $2,314,877.00, after the title to said lands and premises was acquired by and passed to the United States of America.

9. That no compensation has at any time been awarded or paid to claimant by the Government of the United States on this claim; that no action has been taken thereon in Congress or in any of the Executive Departments of the United States, other than may have been taken by the War Department in consequence of a letter mailed under date of January 2, 1923, to The Honorable, The Secretary of War, Washington, D. C., a copy of which letter, marked: Exhibit "B," is hereunto annexed and made a part hereof, and as indicated by a reply to said letter made by J. M. Wainwright, The Assistant Secretary of War, under date of January 10, 1923, a copy of which reply, marked: Exhibit "C," is also hereunto annexed and made a part hereof.

10. That claimant is the sole owner of the claim set forth in this petition; that no assignment or transfer of said claim or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against [fols. 7 & 8] the said Government; and that claimant believes the facts as stated in this petition to be true.

Wherefore, claimant prays for a judgment in its favor and against the United States of America in the sum of one million, one hundred forty-seven thousand, three hundred and forty-seven dollars ($1,147,347), representing compensation for the use and occupation of claimant's lands and premises from April 6, 1917, to June 28, 1918, at the rate of $2,400.00 per diem, and interest on said sum of $2,314,877.00 from June 28, 1918, to January 5, 1919, and for such other and further relief as to this Honorable Court seems right and equitable.

And, claimant will ever pray, etc.

Hamburg-American Line Terminal & Navigation Company, Claimant, by George W. Sterling, Its Secretary and Treasurer. (Hamburg-American Line Terminal & Navigation Co. Corporate Seal, 1899, N. J.) Charles H. Le Fevre, Attorney for Claimant. Attorney's Address: 402-3 Hibbs Building, Washington, D. C.

Certificate to foregoing paper omitted in printing.

[fol. 9] EXHIBIT "A"—CERTIFICATE OF INCORPORATION

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provisions of

an Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations (Revision of 1896)" and the several Supplements thereto and Acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names:

Article First. The name of the corporation is Hamburg-American Line Terminal & Navigation Company.

Article Second. The principal office in the State of New Jersey, is at No. 60 Grand Street, Jersey City, County of Hudson, and is to be registered with the Corporation Trust Company of New Jersey. The name of the agents therein and in charge thereof, and upon whom process against this corporation may be served, is the Corporation Trust Company of New Jersey.

Article Third. The objects for which and for each or any of which the corporation is formed are—

I. To carry on the business of warehousemen and wharfingers in all its branches respectively, and in that behalf and for that purpose or otherwise to purchase, acquire, own, construct, hire, use, sell and lease wharves, piers, docks, slips and other terminal property, including lands, tenements and heriditaments in the States of New Jersey and New York and elsewhere in the United States of America and in foreign countries, including their colonies and dependencies, for the purpose of landing, mooring, loading and discharging sea-[fol. 10] going and other ships, vessels, barges, tenders, lighters and boats of any and every nature and description.

II. To transport passengers, property and freight, including cattle, by water, and in that behalf or otherwise to build, purchase, own, charter, operate, sell and lease ships, vessels, barges, tenders, lighters and boats of any and every nature, kind and description, to be operated by steam, sail or otherwise in and between the port of New York and ports of other countries, and in and between other ports of the United States of America, and foreign countries, including their colonies and dependencies, as well as in and between different ports of the United States of America, including the colonies of the same, or otherwise.

III. To apply for and obtain from the Government of the United States of America, or from any other Government the registry, license or enrollment of such ships, vessels or boats of any and every name, nature and description, as may be built, acquired, owned, chartered or operated by the Corporation in and about its business of transporting passengers, freight and property in and between the different ports of the United States of America and their colonies, and in and between ports of the United States and the ports of foreign countries, their colonies and dependencies, or otherwise.

IV. To acquire the good will, business and property, real and personal, including assets of any and every description, and to

assume the liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of this corporation, or otherwise, and to secure the payment of any bonds or other evidences of indebtedness given therefor, by a mortgage or mortgages covering the real and personal property of this corporation or any part thereof.

[fol. 11] Article Fourth. In furtherance and not in limitation of the general powers conferred by the Laws of the State of New Jersey, and of the objects and purposes as hereinabove stated, it is hereby further expressly provided that the Company shall have the following additional powers and objects, viz.:

I. To do any or all of the things herein set forth as objects, purposes, powers or otherwise to the same extent, and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

II. To conduct business in all its branches and have one or more offices, and to hold, purchase and convey real and personal property without limit as to amount, both within and without the State of New Jersey, and in all other states, territories and colonies of the United States, including the District of Columbia, and in all foreign countries and places, but subject always to the laws thereof.

III. To manufacture, purchase, or otherwise acquire, hold, own, mortgage, sell, assign and transfer, invest, trade, deal in and deal with goods, wares and merchandise, real estate and personal property and any interests and rights therein and property of every class and description, without limit as to amount, within or without the State of New Jersey, and in any part of the world.

IV. To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, own, use, operate, introduce, sell and assign, or otherwise dispose of any and all [illegible]ulæ, trade-marks, trade names and distinctive marks, and all i[illegible]ns, improvements and processes used in connection with or se[illegible] under Letters Patent of the United States of America, or of any foreign country, and to [fol. 12] use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trade-marks, patents, licenses, concessions, processes and the like, or any such property, rights or inventions so acquired; and with a view to the working and developing of the same, to carry on any business, whether mining, manufacturing or otherwise, which the Corporation may think calculated, directly or indirectly, to effectuate these objects.

V. To hold, purchase, or otherwise acquire, to sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock, bonds or other evidences of indebtedness created by any other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could do.

VI. To purchase, lease, exchange, hire or otherwise acquire, any and all rights, privileges, permits or franchises suitable or convenient for any of the purposes of its business; to erect and construct, make, improve or aid or subscribe towards the construction, making or improvement of, mills, factories, storehouses, buildings, roads, docks, piers, slips, wharves, ships, vessels, boats, houses for employes and others, and works of all kinds, and in conjunction with and in furtherance of the general business and purposes of the corporation, as above described, to construct, lease, own, operate or sell a railroad or railroads or both, in any state or country other than the State of New Jersey, subject to the laws of such other state or country, either directly or through the ownership of stock of a corporation, formed or to be formed for the purpose under the laws of such other state or country.

[fol. 13] VII. To guarantee the payment of dividends or interest on any shares, stocks, debentures, or other securities issued by, or any other contract or obligation of any corporation whenever proper or necessary for the business of this corporation in the judgment of its Directors or the Executive Committee.

VII. To make and enter into contracts of every sort and kind with any individual, firm, association or corporation, whether private, public, or municipal, or body politic, including the Government of the United States, or of any State, territory or colony thereof, and of any foreign country or any colony or dependency thereof.

IX. In general to carry on any other business, whether manufacturing or otherwise, in connection with the foregoing with all the powers now or hereafter conferred by the Laws of New Jersey upon corporations, or by the Laws of any other State or Government to which the Corporation may become subject, and to do all and everything necessary, suitable or proper for the accomplishment of any of the purposes of attainments of any one or more of the objects herein enumerated, or which shall at any time appear conducive to the benefit of the Corporation, either as holders of, or interested in any property or otherwise, including the issuance in that behalf of bonds, debentures and other evidences of indebtedness negotiable or otherwise and the securing the same by mortgage, pledge or otherwise, without limit as to amount.

It is hereby expressly provided and declared to be intended that the foregoing enumeration of specific powers and objects shall not be held or taken to in any wise limit or restrict the objects or powers of the Corporation, but that the objects and powers specified shall be regarded as independent objects and powers.

[fol. 14] Article Fifth. The total authorized capital stock of the corporation is Five hundred thousand (500,000) Dollars. divided into five thousand (5,000) shares of One hundred (100) Dollars each.

Article Sixth. The names of the incorporators, their Post Office addresses, and the number of shares of stock subscribed for by each,

the aggregate of which, One thousand (1,000) Dollars, is the amount of capital stock with which the corporation shall commence business, are as follows:

Name	P. O. address	No. of shares
Emil L. Boas	60 Grand St., Jersey City, N. J.	4
F. George Messmer	207 Palaisade Ave., West Hoboken, N. J.	3
Charles P. O'Swald	60 Grand St., Jersey City, N. J.	3

Article Seventh. The duration of this corporation shall be unlimited.

Article Eighth. The Board of Directors shall have power:

Without the assent or vote of the stockholders to fix the amount to be reserved as working capital.

To authorize and to cause to be executed mortgages and liens without limit as to amount upon the real and personal property of the corporation.

With the consent in writing, or pursuant to the vote of the holders of a majority of the stock issued and outstanding, to sell, assign, transfer or otherwise dispose of the whole property of the corporation, as an entirety.

From time to time to determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders. And no stockholder shall have any right of inspecting any account or book or docu- [fol. 15] ment of this corporation, except as conferred by Statute, or as authorized by the Directors or by a resolution of the stockholders.

Without the assent or vote of the stockholders, to make, alter, amend and rescind the By-Laws of the corporation; but no By-Laws shall be made by the Directors authorizing the sale, assignment, transfer or other disposition of all the property of the corporation as an entirety, except pursuant to the vote of a majority of all the qualified Directors in office at the time.

To designate one or more of their number, from time to time, to constitute an Executive Committee, which Committee to the extent provided in the resolution appointing the same, or by the By-Laws, shall have and may exercise the power of the Board of Directors and the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it.

To hold meetings, to have one or more offices and to keep the books of the corporation, except the stock and transfer books, outside of the State of New Jersey, at such place or places as may from time to time be designated by them.

In addition to the powers by Statute and the By-Laws expressly conferred, to exercise all such powers and do all such acts and things as may be exercised or done by the corporation, but subject, nevertheless, to the provisions of the Statute, of the charter, and to any

regulations that may from time to time be made by the stockholders, provided that no regulations so made shall invalidate any provisions of this Charter.

The Corporation reserves the right to amend, alter or change any provisions contained in this Certificate, in the manner prescribed by Statute, and all rights conferred on Stockholders herein are granted subject to this reservation.

[fol. 16] Article Ninth. The Corporation may use and apply its surplus earnings or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock from time to time to such extent, in such manner, and upon such terms as its Board of Directors shall determine; and neither the property nor the capital stock so purchased and acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority of the Board of Directors.

The Corporation may in its By-Laws confer powers additional to the foregoing upon its Directors, and may prescribe the number necessary to constitute a quorum of its Board of Directors, which may be less than a majority of the same.

Witness the hands and seals of said incorporators this 24th day of October, 1899.

Emil L. Boas. [L. S.] F. G. Messmer. [L. S.] C. P. O'Swald. [L. S.]

In presence of: J. P. Meyer; Julius J. Frank, Solicitor, 27-29 Pine Street, New York.

[10c. Internal Revenue Stamp Cancelled.] [10c. Internal Revenue Stamp Cancelled.]

[fol. 17] State of New York,
County of New York, ss:

Be it remembered that on the 24th day of October, A. D. Eighteen hundred and ninety-nine, before me, the Subscriber, a Commissioner of Deeds for New Jersey residing in New York, personally appeared Julius Paul Meyer, who, being by me duly sworn, on his oath did depose and say, that he saw Emil L. Boas, F. George Messmer and Charles P. O'Swald, the persons named in the foregoing certificate, sign, seal and deliver the same as their voluntary act and deed, and that the deponent at the same time subscribed his name thereto as a witness of the execution thereof.

J. P. Meyer.

Subscribed and sworn to before me the day and year aforesaid. Jno. S. Parker, a Commissioner of Deeds for New Jersey, residing in New York. (Seal.)

Endorsed: "Received in the Hudson Co., N. J. Clerk's Office, Oct. 25th, A. D. 1899, and Recorded in Clerk's Record No. —, on page —. John G. Fisher, Clerk. Filed Oct. 26, 1899. George Wurts, Secretary of State."

(Stamped on back: State of New Jersey, Department of State, [fol. 18] Comparing and Certification Division. Copy correct. Compared by J. L. Hendricks. Original Read by J. G. Fisher. J. L. Hendricks, in charge of Division.)

State of New Jersey, Department of State

I, David S. Crater, Secretary of State of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Certificate of Incorporation of Hamburg-American Line Terminal & Navigation Company, and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Twenty-sixth day of October, A. D. 1899, and now remaining on file and of record therein.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Second day of April, A. D. 1913.
David S. Crater, Secretary of State. (Seal.)

[fol. 19] EXHIBIT "B"—LETTER OF JAN. 2, 1923

January 2, 1923.

The Honorable the Secretary of War, Washington, D. C.

SIR: At the request of Colonel Thomas W. Miller, Alien Property Custodian, I have been retained by the directors of the Hamburg-American Line Terminal and Navigation Company, corporation created by and existing under the laws of the State of New Jersey, to reduce to the possession of the corporation, or to make recovery of, all assets of the corporation, preliminary to a dissolution of the corporation.

All the issued and outstanding capital stock (11 shares) of said corporation was seized during the war by the Alien Property Custodian as being beneficially held for the Hamburg-American Line, a German corporation, and through his stock control, the Alien Property Custodian elected those who are now the directors and managers of the Hamburg-American Line Terminal and Navigation Company. At the time the United States entered into the war, the property of the New Jersey corporation consisted chiefly of bank deposits, real estate situated at Hoboken, N. J., on which was constructed piers and pier buildings, and some vessel property consisting of two tugboats (Nos. 2 and 3), a lighter ("Columbia," formerly "H.A.L." 1), a steam launch (No. 4), and a coal hoister. All of

this property was taken over by the United States Government, and, as I am informed, came under the control of the War Department.

By a Proclamation (No. 1464), made June 28, 1918, the President, pursuant to the provisions of an Act of Congress (Public-No. 109-65th Congress), approved March 28, 1918, took over for the [fol. 20] United States said piers and pier buildings and by a later Proclamation, issued December 3d, 1918, fixed the compensation to be paid the Hamburg-American Line Terminal and Navigation Company therefor at $2,314,877, which sum a few days later was paid to the corporation, then under the Alien Property Custodian's management.

The Hamburg-American Line Terminal and Navigation Company has not as yet been compensated for the use and occupation of the real estate from April 6, 1917, to June 28, 1918, nor for the vessel property aforesaid.

Will you kindly advise me as to how the directors of the Hamburg-American Line Terminal and Navigation Company, a corporation of the State of New Jersey, can now proceed to effect a recovery for the use and occupation of the pier property at Hoboken, N. J., from April 6, 1917, to June 28, 1918, and of the vessel property, or its real value, and compensation for the use of said vessel property while in the possession of the Government.

Very truly yours, (Signed) Charles H. Le Fevre.

[fol. 21] EXHIBIT "C"—LETTER OF JAN. 10, 1923

War Department, Office of the Assistant Secretary, Washington, D. C.

ATS-924-LIQ. January 10, 1923.

Mr. Charles H. Le Fevre, Attorney and Counsellor at Law, Hibbs Building, 725 Fifteenth St. N. W., Washington, D. C.

DEAR SIR: Receipt is acknowledged of your letter of January 2, 1923, relating to property of the Hamburg-American Line Terminal and Navigation Company, a corporation of New Jersey formerly German owned property located at Hoboken, N. J., seized by the Alien Property Custodian during the war.

In regard to the request presented in your letter, I am not prepared at this time, prior to an investigation and examination of the facts in the case, to advise you as to how the directors of the Hamburg American Line Terminal and Navigation Company may now proceed to effect a recovery, if entitled thereto, for the use and occupation of the pier property at Hoboken, N. J., from April 6, 1917, to June 28, 1918, and of certain vessel property while in possession of the Government. Investigation of this matter, however, will be undertaken at once, the results of which will be communicated to you at a later date.

Very truly yours, (Signed) J. M. Wainwright. J. M. Wainwright, the Assistant Secretary of War.

[fol. 22] III. Defendant's Demurrer.—Filed May 26, 1923

(Note.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Charles H. Le Fevre, on Feb. 20, for the plaintiff, in this case, and the demurrer was submitted.

V. Order of Court Dismissing Amended Petition and Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that said demurrer be and the same is sustained, and the amended petition is dismissed.

Memorandum

The court holds it has not jurisdiction of this case. Its reasons are stated at length in its opinion in Deutsch-Australische Dampschiffs-Gesellschaft, No. 576, decided March 17, 1924. The Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat., 459 and 1914) it must be presumed (1) to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property.

[fol. 23]

VI

Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and rea-onable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per dead-weight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 24] On April 6, 1917, the Congress adpoted the joint resolution declaring the existence of a state of war between the United

States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied con-

tract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be a "statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 25] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject. the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case. 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by th Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page

122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court is asked to [fol. 26] order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned prop-

erty, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 27] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315,

320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 28] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92, "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government in-

tended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 29] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 30] VII. Proceedings After Entry of Judgment

On May 14, 1924, the plaintiff filed a motion for a new trial. On May 26, 1924, the court filed an order overruling said motion.

VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed June 4, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, and from the decree entered in said cause on the twenty-sixth day of May, 1924, overruling claimant's motion for a new trial, the claimant, by its attorney, on this fourth day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Charles H. Le Fevre, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

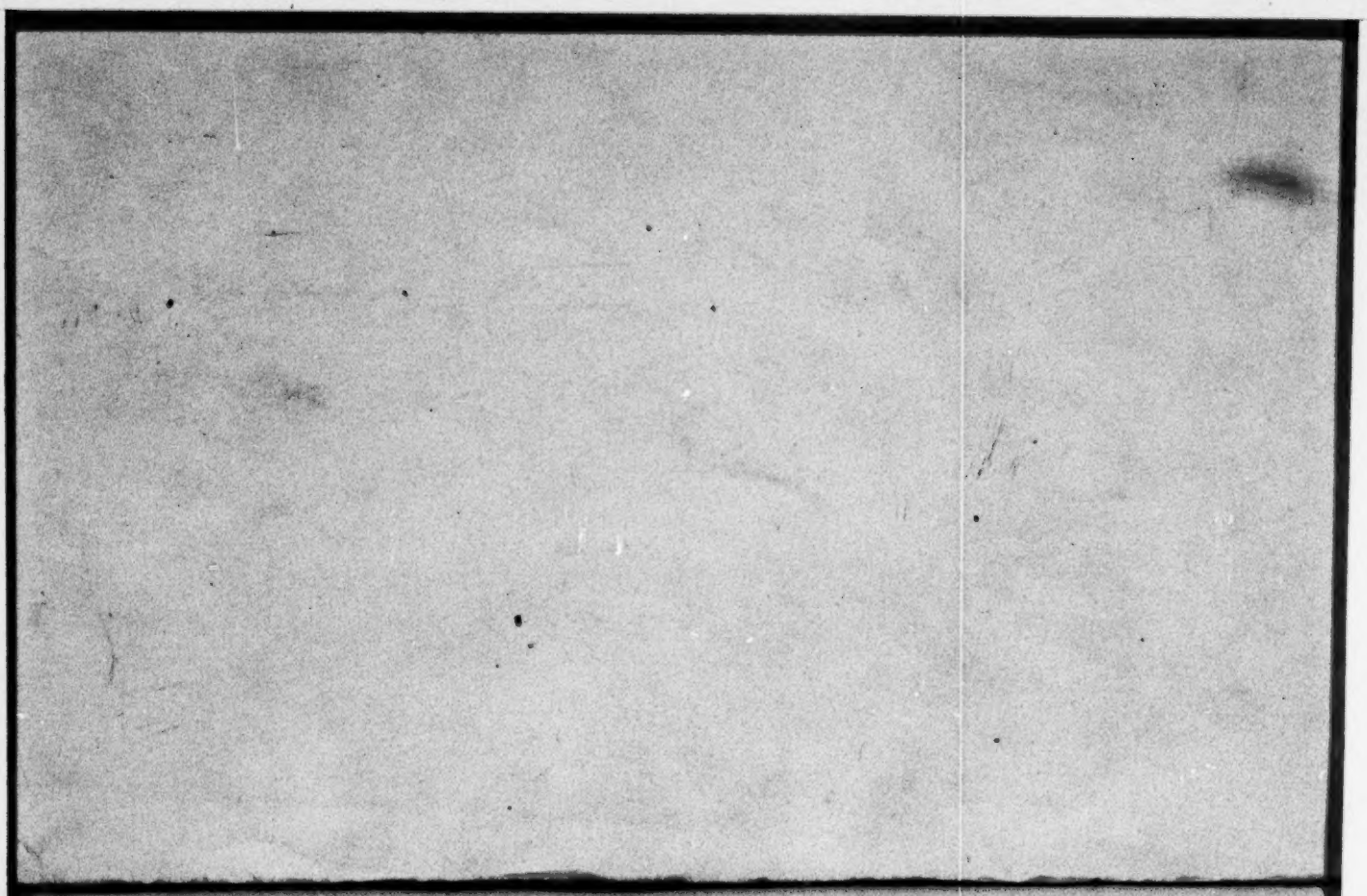
[fol. 31] [Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the proceedings after entry of judgment; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Eighteenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,440. Court of Claims. Term No. 475. Hamburg-American Line Terminal & Navigation Company, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,440.



CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 476

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1924

(30,441)

(30,441)

SUPREME COURT OF THE UNITED STATES

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No. 476

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] COURT OF CLAIMS OF THE UNITED STATES

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, a Corporation,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION AND EXHIBITS—Filed Feb. 19, 1924

To the Honorable the Court of Claims:

The claimant, Hamburg-American Line Terminal & Navigation Company, respectfully represents:

1. That claimant is a corporation created by and existing under the laws of the State of New Jersey; that a copy of its Certificate of Incorporation, marked Exhibit "A," is hereunto annexed and made a part hereof; that it was organized on the twenty-sixth day of October, A. D. 1899, to exercise and perform the powers conferred upon it by said laws and to carry on any business or occupation necessary and proper to effectuate any or all of the objects for which it was formed; that from the date of such organization until a declaration of war by the United States of America against the Imperial German Government on the sixth day of April, A. D. 1917, made trading with Germany and its nationals unlawful on the part of persons in the United States, claimant was a subsidiary corporation [fol. 2] of the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, a German corporation engaged in the business of maritime transportation and known commonly in said business as the "Hamburg-American Line," in that all of the issued and outstanding capital stock of claimant was during such period beneficially held for said German corporation; that said stock continued to be so held until sometime in or about the month of December, A. D. 1917, when said stock was seized and taken over by the Alien Property Custodian, and has since then been held under the control and management of said Alien Property Custodian, pursuant to the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, the amendments thereto and the Executive Orders issued in pursuance thereof; and that all members of claimant's board of directors, as at present constituted, hold office as such by virtue of their having been regularly elected directors by

the vote of the said Alien Property Custodian and his nominees at a stockholders' meeting held at claimant's registered office, No. 15 Exchange Place, Jersey City, New Jersey, on the sixth day of September, A. D. 1922.

2. That prior to the sixth day of April, A. D. 1917, by expenditures amounting in the total to one hundred twenty thousand, six hundred and fifty-nine dollars ($120,659.00), claimant acquired title to and became the owner of two tug-boats (steam screws), a launch (steam screw), a barge, and a coal hoister, all of which floating craft, were used in claimant's business, carried on in the Port of [fol. 3] New York, until they were requisitioned by the Government of the United States, as hereinafter mentioned, when said floating craft had a market, or commercial, value estimated at one hundred eighty-four thousand, one hundred and twenty-four dollars and sixty-six cents ($184,124.66). Said floating craft are more particularly described as follows:

(a) Name of Vessel: "Hamburg-American Line No. 2," Ex-Frank Steers.
Official Number: 200449.
Documented under Permanent Enrollment, No. 160, at New York, on November 27, 1912.
Built at Tottenville, N. Y., in 1903, by Brown Shipbuilding Co.
Rig: Steam screw.
Gross Tonnage: 52. Net Tonnage: 35.
Length: 60.0 feet. Breadth: 17.8 feet. Depth: 7.6 feet.
Service: Towing.

Original Cost, to Claimant $14,700.00
Commercial Value, April 6, 1917 ..... $10,640.00

(b) Name of Vessel: "Hamburg-American Line No.3."
Official Number: 211187.
Documented under Permanent Enrollment, No. 563, at New York, on May 3, 1913.
Built at Port Richmond, N. Y., in 1913, by Staten Island Shipbuilding Company.
Rig: Steam screw.
Gross Tonnage: 284. Net Tonnage: 193.
Length: 111.8 feet. Breadth: 27.6 feet. Depth: 14.4 feet.
[fol. 4] Service: Freight. Indicated Horsepower: 1,100.

Original Cost, to Claimant $77,179.00
Commercial Value, April 6, 1917 ..... $124,644.10

(c) Name of Vessel: "Hamburg-American Line No. 4."
Official Number: 211619.
Documented under Permanent Enrollment, No. 79, at New York, on October 24, 1913.
Built in New York, N. Y., in 1913, by Gas Engine & Power Co.
Rig: Steam screw.
Gross Tonnage: 20. Net Tonnage: 13.

Length: 54.7 feet. Breadth: 10.0 feet. Depth: 4.4 feet.
Service: Passenger. Indicated Horsepower: 70.

Original Cost, to Claimant $17,100.00
Commercial Value, April 6, 1917 ..... $28,428.76

(d) Name of Vessel: "Columbia" Ex-"Hamburg-American Line No. 1."
Official Number: 165548.
Documented under Permanent Enrollment, No. 103, at New York, on October 23, 1916.
Class: Barge. Construction: Wooden.

Original Cost, to Claimant $7,480.00
Commercial Value, April 6, 1917 ..... $12,830.80

(e) Coal Hoister No. 5.
Hull rebuilt by Staten Island Shipbuilding Company 1914.

Original Cost, to Claimant $4,200.00
Commercial Value, April 6, 1917 ..... $7,581.00

[fol. 5] 3. That on or about the sixth day of April, A. D. 1917, at the Port of New York, or in the waters thereof contiguous to claimant's piers at Hoboken, New Jersey, the United States of America by the Treasury Department, acting through United States customs officials, requisitioned or commandeered all of said floating craft and later, to-wit: on April 17, A. D. 1917, turned the same over to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having ordered The Depot Quartermaster, New York, to take possession and assume control thereof, and said floating craft has ever since remained in the custody of the War Department of the United States of America, without any agreement with claimant concerning the compensation to be paid to claimant for its property so taken for public use.

4. That claimant, as a loyal citizen, in view of the national necessity, then existing, which required the acquisition and use of said floating craft by the United States of America, acquiesced in said taking and detention thereof, but by virtue of the provision contained in the Fifth Amendment to the Constitution of the United States, expressed in the words: "nor shall private property be taken for public use, without just comp-nsation," it is justly entitled to have and receive from the United States of America compensation for its property so taken and retained.

5. That claimant founds its claim, on which this suit is brought, upon said Act of August 29, 1916, and upon said provision of the Constitution of the United States, and an implied contract with the Government of the United States, arising out of the facts herein stated and warranting the inference of an agreement on the part of

[fol. 6] said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has been deprived of the use of its said property or for the time of the withholding of said price from claimant since this claim first accrued.

6. That no compensation has at any time been awarded or paid to claimant by the Government of the United States on this claim; that no action has been taken thereon in Congress or in any of the Executive Departments of the United States, other than may have been taken by the War Department in consequence of a letter mailed under date of January 2, 1923, to The Honorable, The Secretary of War, Washington, D. C., a copy of which letter, marked Exhibit "B," is hereunto annexed and made a part hereof, and as indicated by a reply to said letter made by J. M. Wainwright, The Assistant Secretary of War, under date of January 10, 1923, a copy of which reply, marked Exhibit "C," is also hereunto annexed and made a part hereof.

7. That the claimant is the sole owner of the claim set forth in this petition; that no assignment or transfer of said claim or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way vountarily aided, abetted, or given encouragement to rebellion against the said [fols. 7 & 8] Government; and that claimant believes the facts as stated in this petition to be true.

Wherefore, claimant prays for a judgment in its favor and against the United States of America in the sum of $184,124.66, it being the market value of said floating craft at or about the time same were taken into the custody of the United States of America, as aforesaid, plus interest on said sum from the sixth day of April, A. D. 1917, the date when the possession of said floating craft was taken over to the United States, as aforesaid, and for such other and further relief as to this Honorable Court seems right and equitable.

And, claimant will ever pray, etc.

(Hamburg-American Line Terminal & Navigation Company, Claimant, by George W. Sterling, its Secretary and Treasurer. Hamburg-American Terminal & Navigation Co. Corporate Seal, 1899, N. J.) Charles H. Le Fevre, Attorney for Claimant.

Certificate to foregoing paper omitted in printing.

[fol. 9] (EXHIBIT "A.") CERTIFICATE OF INCORPORATION

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provisions of an

Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations (Revision of 1896)" and the several Supplements thereto and Acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names:

Article First: The name of the corporation is Hamburg-American Line Terminal & Navigation Company.

Article Second: The principal office in the State of New Jersey, is at No. 60 Grand Street, Jersey City, County of Hudson, and is to be registered with the Corporation Trust Company of New Jersey. The name of the agents therein and in charge thereof, and upon whom process against this corporation may be served, is the Corporation Trust Company of New Jersey.

Article Third: The objects for which and for each or any of which the corporation is formed are,—

I. To carry on the business of warehousemen and wharfingers in all its branches respectively, and in that behalf and for that purpose or otherwise to purchase, acquire, own, construct, hire, use, sell and lease wharves, piers, docks, slips and other terminal property, including lands, tenements and heriditaments in the States of New Jersey and New York and elsewhere in the United States of America and in foreign countries, including their colonies and dependencies, [fol. 10] for the purpose of landing, mooring, loading and discharging sea-going and other ships, vessels, barges, tenders, lighters and boats of any and every nature and description.

II. To transport passengers, property and freight, including cattle, by water, and in that behalf or otherwise to build, purchase, own, charter, operate, sell and lease ships, vessels, barges, tenders, lighters and boats of any and every nature, kind and description, to be operated by steam, sail or otherwise in and between the port of New York and ports of other countries, and in and between other ports of the United States of America, and foreign countries, including their colonies and dependencies, as well as in and between different ports of the United States of America, including the colonies of the same, or otherwise.

III. To apply for and obtain from the Government of the United States of America, or from any other Government the registry, license or enrollment of such ships, vessels or boats of any and every name, nature and description, as may be built, acquired, owned, chartered or operated by the Corporation in and about its business of transporting passengers, freight and property in and between the different ports of the United States of America and their colonies, and in and between ports of the United States and the ports of foreign countries, their colonies and dependencies, or otherwise.

IV. To acquire the good will, business and property, real and personal, including assets of any and every description, and to assume the liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of this corpora-

tion, or otherwise, and to secure the payment of any bonds or other evidences of indebtedness given therefor, by a mortgage or mortgages covering the real and personal property of this corporation or any part thereof.

[fol. 11] Article Fourth: In furtherance and not in limitation of the general powers conferred by the Laws of the State of New Jersey, and of the objects and purposes as hereinabove stated, it is hereby further expressly provided that the Company shall have the following additional powers and objects, viz.:

I. To do any or all of the things herein set forth as objects, purposes, powers or otherwise to the same extent, and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

II. To conduct business in all its branches and have one or more offices, and to hold, purchase and convey real and personal property without limit as to amount, both within and without the State of New Jersey, and in all other states, territories and colonies of the United States, including the District of Columbia, and in all foreign countries and places, but subject always to the laws thereof.

III. To manufacture, purchase, or otherwise acquire, hold, own, mortgage, sell, assign and transfer, invest, trade, deal in and deal with goods, wares and merchandise, real estate and personal property and any interests and rights therein and property of every class and description, without limit as to amount, within or without the State of New Jersey, and in any part of the world.

IV. To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, own, use, operate, introduce, sell and assign, or otherwise dispose of any and all formulæ, trade-marks, trade names and distinctive marks, and all inventions, improvements and processes used in connection with or secured under Letters Patent [fol. 12] of the United States of America, or of any foreign country, and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trade-marks, patents, licenses, concessions, processes and the like, or any such property, rights or inventions so acquired; and with a view to the working and developing of the same, to carry on any business, whether mining, manufacturing or otherwise, which the Corporation may think calculated, directly or indirectly, to effectuate these objects.

V. To hold, purchase, or otherwise acquired, to sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock, bonds or other evidences of indebtedness created by any other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could do.

VI. To purchase, lease, exchange, hire or otherwise acquire, any and all rights, privileges, permits or franchises suitable or convenient

for any of the purposes of its business; to erect and construct, make, improve or aid or subscribe towards the construction, making or improvement of, mills, factories, storehouses, buildings, roads, docks, piers, slips, wharves, ships, vessels, boats, houses for employes and others, and works of all kinds, and in conjunction with and in furtherance of the general business and purposes of the corporation, as above described, to construct, lease, own, operate or sell a railroad or railroads or both, in any state or country other than the State of New Jersey, subject to the laws of such other state or country, either directly or through the ownership of stock of a corporation, formed or to be formed for the purpose under the laws of such other state or country.

[fol. 13] VII. To guarantee the payment of dividends or interest on any shares, stocks, debentures, or other securities issued by, or any other contract or obligation of any corporation whenever proper or necessary for the business of this corporation in the judgment of its Directors or the Executive Committee.

VIII. To make and enter into contracts of every sort and kind with any individual, firm, association or corporation, whether private, public, or municipal, or body politic, including the Government of the United States, or of any State, territory or colony thereof, and of any foreign country or any colony or dependency thereof.

IX. In general to carry on any other business, whether manufacturing or otherwise, in connection with the foregoing with all the powers now or hereafter conferred by the Laws of New Jersey upon corporations, or by the Laws of any other State or Government to which the Corporation may become subject, and to do all and everything necessary, suitable or proper for the accomplishment of any of the purposes of attainments of any one or more of the objects herein enumerated, or which shall at any time appear conducive to the benefit of the Corporation, either as holders of, or interested in any property or otherwise, including the issuance in that behalf of bonds, debentures and other evidences of indebtedness negotiable or otherwise and the securing the same by mortgage, pledge or otherwise, without limit as to amount.

It is hereby expressly provided and declared to be intended that the foregoing enumeration of specific powers and objects shall not be held or taken to in any wise limit or restrict the objects or powers of the Corporation, but that the objects and powers specified shall be regarded as independent objects and powers.

[fol. 14] Article Fifth. The total authorized capital stock of the corporation is Five hundred thousand (500,000) Dollars, divided into five thousand (5,000) shares of One hundred (100) Dollars each.

Article Sixth. The names of the incorporators, their Post Office addresses, and the number of shares of stock subscribed for by each, the aggregate of which, One thousand (1,000) Dollars, is the

amount of capital stock with which the corporation shall commence business, are as follows:

Name	P. O. address	No. of shares
Emile L. Boas	60 Grand St., Jersey City, N. J.	4
F. George Messmer	207 Palisade Ave., West, Hoboken, N. J.	3
Charles P. O'Swald	60 Grand St., Jersey City, N. J.	3

Article Seventh. The duration of this corporation shall be unlimited.

Article Eighth. The Board of Directors shall have power:

Without the assent or vote of the stockholders to fix the amount to be reserved as working capital.

To authorize and to cause to be executed mortgages and liens without limit as to amount upon the real and personal property of the corporation.

With the consent in writing, or pursuant to the vote of the holders of a majority of the stock issued and outstanding, to sell, assign, transfer or otherwise dispose of the whole property of the corporation, as an entirety.

From time to time to determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders. And no stockholder shall have any right of inspecting any account or book or [fol. 15] document of this corporation, except as conferred by Statute, or as authorized by the Directors or by a resolution of the stockholders.

Without the assent or vote of the stockholders, to make, alter, amend and rescind the By-Laws of the corporation; but no By-Laws shall be made by the Directors authorizing the sale, assignment, transfer or other disposition of all the property of the corporation as an entirety, except pursuant to the vote of a majority of all the qualified Directors in office at the time.

To designate one or more of their number, from time to time, to constitute an Executive Committee, which Committee to the extent provided in the resolution appointing the same, or by the By-Laws, shall have and may exercise the power of the Board of Directors and the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it.

To hold meetings, to have one or more offices and to keep the books of the corporation, except the stock and transfer books, outside of the State of New Jersey, at such place or places as may from time to time be designated by them.

In addition to the powers by Statute and the By-Laws expressly conferred, to exercise all such powers and do all such acts and things as may be exercised or done by the corporation, but subject, nevertheless, to the provisions of the Statute, of the charter, and to any

regulations that may from time to time be made by the stockholders, provided that no regulations so made shall invalidate any provisions of this Charter.

The Corporation reserves the right to amend, alter or change any provisions contained in this Certificate, in the manner prescribed by Statute, and all rights conferred on Stockholders herein are granted subject to this reservation.

[fol. 16] Article Ninth: The Corporation may use and apply its surplus earnings or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock from time to time to such extent, in such manner, and upon such terms as its Board of Directors shall determine; and neither the property nor the capital stock so purchased and acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority of the Board of Directors.

The Corporation may in its By-Laws confer powers additional to the foregoing upon its Directors, and may prescribe the number necessary to constitute a quorum of its Board of Directors, which may be less than a majority of the same.

Witness the hands and seals of said incorporators this 24th day of October, 1899.

Emil L. Boas [L. S.] F. G. Messmer [L. S.] C. P. O'Swald [L. S.]

In presence of: J. P. Meyer, Julius J. Frank, Solicitor, 27-29 Pine Street, New York. [10c. Internal Revenue Stamp Cancelled.] [10c. Internal Revenue Stamp Cancelled.]

[fol. 17] State of New York,
County of New York, ss.:

Be it remembered that on the 24th day of October, A. D. Eighteen hundred and ninety-nine, before me, the Subscriber, a Commissioner of Deeds for New Jersey residing in New York, personally appeared Julius Paul Meyer, who, being by me duly sworn, on his oath did depose and say, that he saw Emil L. Boas, F. George Messmer and Charles P. O'Swald, the persons named in the foregoing certificate, sign, seal and deliver the same as their voluntary act and deed, and that the deponent at the same time subscribed his name thereto as a witness of the execution thereof.

J. P. Meyer.

Subscribed and sworn to before me the day and year aforesaid. Jno. S. Parker, a Commissioner of Deeds of New Jersey residing in New York. (Seal.)

Endorsed: "Received in the Hudson Co., N. J. Clerk's Office, Oct. 25th, A. D. 1899, and Recorded in Clerk's Record No. —, on page —. John G. Fisher, Clerk. Filed Oct. 26, 1899. George Wurts, Secretary of State."

(Stamped on back: State of New Jersey, Department of State, Comparing and Certification Division. Copy correct. Compared by [fol. 18] J. L. Hendricks. Original read by J. G. Fisher. J. L. Hendricks, in charge of Division.)

State of New Jersey, Department of State.

I, David S. Crater, Secretary of State of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Certificate of Incorporation of Hamburg-American Line Terminal & Navigation Company, and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Twenty-sixth day of October, A. D. 1899, and now remaining on file and of record therein.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Second day of April, A. D. 1913.

David S. Crater, Secretary of State. (Seal.)

[fol. 19] EXHIBIT "B"—LETTER OF JAN. 2, 1923

January 2, 1923.

The Honorable the Secretary of War, Washington, D. C.

SIR: At the request of Colonel Thomas W. Miller, Alien Property Custodian, I have been retained by the directors of the Hamberg-American Line Terminal and Navigation Company, corporation created by and existing under the laws of the State of New Jersey, to reduce to the possession of the corporation, or to make recovery of all assets of the corporation, preliminary to a dissolution of the corporation.

All the issued and outstanding capital stock (11 shares) of said corporation was seized during the war by the Alien Property Custodian as being beneficially held for the Hamburg-American Line, a German corporation, and, through his stock control, the Alien Property Custodian elected those who are now the directors and managers of the Hamburg-American Line Terminal and Navigation Company. At the time the United States entered into the war, the property of the New Jersey corporation consisted chiefly of bank deposits, real estate situated at Hoboken, N. J., on which was constructed piers and pier buildings, and some vessel property consisting of two tugboats (Nos. 2 and 3), a lighter ("Columbia," formerly "H.A.L." 1), a steam launch (No. 4), and a coal hoister. All of this property was taken over by the United States Government, and, as I am informed, came under the control of the War Department.

By a Proclamation (No. 1464), made June 28, 1918, the President, pursuant to the provisions of an Act of Congress (Public-No. 109-65th Congress), approved March 28, 1918, took over for the [fol. 20] United States said piers and pier buildings and by a later

Proclamation, issued December 3d, 1918, fixed the compensation to be paid the Hamburg-American Line Terminal and Navigation Company therefor at $2,314,877, which sum a few days later was paid to the corporation, then under the Alien Property Custodian's management.

The Hamburg-American Line Terminal and Navigation Company has not as yet been compensated for the use and occupation of the real estate from April 6, 1917, to June 28, 1918, nor for the vessel property aforesaid.

Will you kindly advise me as to how the directors of the Hamburg-American Line Terminal and Navigation Company, a corporation of the State of New Jersey, can now proceed to effect a recovery for the use and occupation of the pier property at Hoboken, N. J., from April 6, 1917, to June 28, 1918, and of the vessel property, or its real value, and compensation for the use of said vessel property while in the possession of the Government.

Very truly yours, (Signed) Charles H. Le Fevre.

[fol. 21] EXHIBIT "C"—LETTER OF JAN. 10, 1923

War Department,

Office of the Assistant Secretary,

Washington, D. C.

ATS-924-LIQ. January 10, 1923.

Mr. Charles H. LeFevre,
Attorney and Counsellor at Law,
Hibbs Building,
725 Fifteenth St., N. W., Washington, D. C.

DEAR SIR: Receipt is acknowledged of your letter of January 2, 1923, relating to property of the Hamburg-American Line Terminal and Navigation Company, a corporation of New Jersey formerly German owned property located at Hoboken, N. J., seized by the Alien Property Custodian during the war.

In regard to the request presented in your letter, I am not prepared at this time, prior to an investigation and examination of the facts in the case, to advise you as to how the directors of the Hamburg-American Line Terminal and Navigation Company may now proceed to effect a recovery, if entitled thereto, for the use and occupation of the pier property at Hoboken, N. J., from April 6, 1917, to June 28, 1918, and of certain vessel property while in possession of the Government. Investigation of this matter, however, will be undertaken at once, the results of which will be communicated to you at a later date.

Very truly yours, (Signed) J. M. Wainwright. J. M. Wainwright, The Assistant Secretary of War.

[fol. 22] III. Defendant's Demurrer—Filed May 26, 1923

Note.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Charles H. Le Fevre, on Feb. 20, for the plaintiff in this case, and the demurrer was submitted.

V. Order of Court Dismissing Amended Petition, and Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that said demurrer be and the same is sustained, and the amended petition is dismissed.

Memorandum

1. The action sounds in tort. Ribas v. Hijo Case, 194 U. S., 315; Herrera Case, 222 U. S., 558.

2. The court is without jurisdiction. Cases supra. See also opinion in Deutsch-Australische Dampschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

[fol. 23] VI. Opinion of the Court Referred to in Court's Memorandum

(Decided March 17, 1924)

Deutsch-Australische Dampfschiffs-Gesellschaft,

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abondoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 24] On April 6, 1917, the Congress adopted the joint resolution

declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and the title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that

the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 25] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, —U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 67; Klebe Case supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The

court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has intraduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court [fol. 26] is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls. 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was dominciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial

dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 27] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation and speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United

States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions. Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring power [fol. 28] upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute,

which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 29] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 30] VIII. Proceedings After Entry of Judgment

On May 15, 1924, the plaintiff filed a motion for a new trial. On May 26, 1924, the court filed an order overruling said motion.

VIII. Plaintiff's Application for Appeal—Filed June 4, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, and from the decree entered in said cause on the twenty-sixth day of May, 1924, overruling claimant's motion for a new trial, the claimant, by its attorney, on this fourth day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Charles H. Le Fevre, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

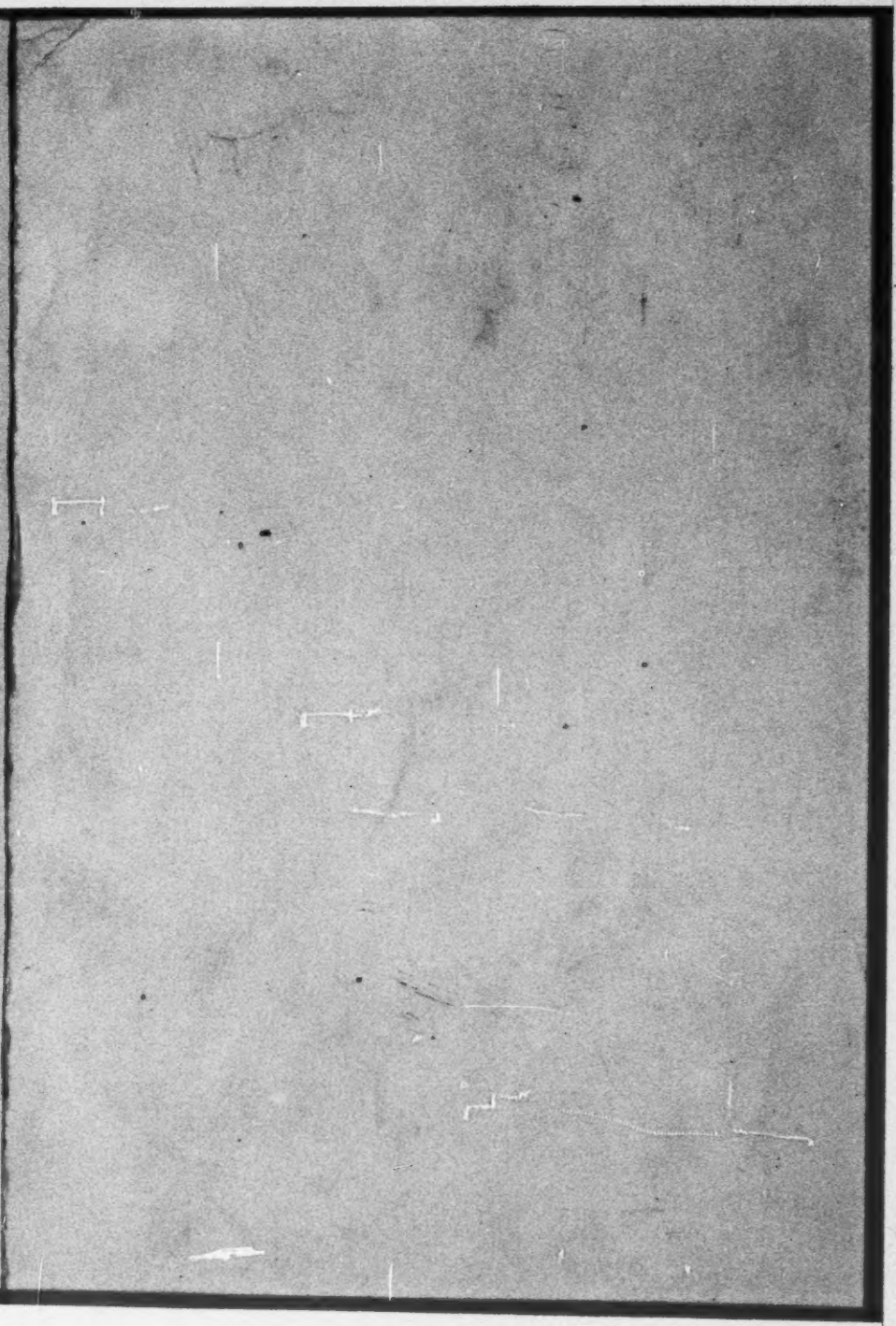
[fol. 31] [Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the proceedings after entry of judgment; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Eighteenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,441. Court of Claims. Term No. 476. Hamburg-American Line Terminal & Navigation Company, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,441.



CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

ATLAS LINE STEAMSHIP COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1924

(30,442)

(30,442)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 477

ATLAS LINE STEAMSHIP COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1934

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

ATLAS LINE STEAMSHIP COMPANY, a Corporation,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION AND EXHIBITS—Filed Feb. 19, 1924

To the Honorable the Court of Claims:

The claimant, Atlas Line Steamship Company, respectfully represents:

1. That claimant is a corporation created by and existing under the laws of the State of New Jersey; that a copy of its Certificate of Incorporation, marked: Exhibit "A," is hereunto annexed and made a part hereof; that it was organized on the twenty-third day of June, A. D. 1903, to exercise and perform the powers conferred upon it by said laws and to carry on any business or occupation necessary and proper to effectuate any or all of the objects for which it was formed; that from the date of such organization until a declaration of war by United States of America against the Imperial German Government on the sixth day of April, A. D. 1917, [fol. 2] made trading with Germany and its nationals unlawful on the part of persons in the United States, claimant was a subsidiary corporation of the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, a German corporation engaged in the business of maritime transportation and known commonly in said business as the "Hamburg-American Line," in that all of the issued and outstanding capital stock of claimant was during such period beneficially held for said German corporation; that said stock continued to be so held until sometime in or about the month of December, A. D. 1917, when said stock was seized and taken over by the Alien Property Custodian, and has since then been held under the control and management of said Alien Property Custodian, pursuant to the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, the amendments thereto and the Executive Orders issued in pursuance thereof; and that all members of claimant's board of directors, as at present constituted, hold office as such by virtue of their having

been regularly elected directors by the vote of the said Alien Property Custodian and his nominees at a stockholders' meeting held at claimant's registered office, No. 15 Exchange Place, Jersey City, New Jersey, on the sixth day of September, A. D. 1922.

2. That some few years prior to the sixth day of April, A. D. 1917, to-wit: in the year A. D. 1913, at a cost, or expenditure, of seventeen thousand and five hundred dollars ($17,500.00), claimant acquired title to and became the owner of three barges, named the "Arni" (Official Number, 29998), the "Argos" (Official Num-[fol. 3] ber 30060), and the "Aroa" (Official Number, 30062), respectively, all of which were documented under the laws of the United States, at New York, on March 1, 1913, under Permanent Enrollment Numbers 465, 466 and 467, respectively, and said barges were used in claimant's business, carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States, as hereinafter mentioned, when said barges had a market, or commercial value estimated at $14,250.00, apportioned as follows:

"Arni"	$3,000.00,
"Argos"	6,450.00,
"Aroa"	4,800.00,
	$14,250.00.

3. That on or about the sixth day of April, A. D. 1917, in the Port of New York, City and State of New York, the United States of America by the Treasury Department, acting through customs officials, requisitioned said barges, and soon thereafter said barges were transferred to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having, on April 16, 1917, ordered The Depot Quartermaster, New York, to take possession and assume control thereof.

4. That all of said barges, listed as "lighters," are included in an Executive Order made on the thirtieth day of June, 1917, a copy of which, marked: Exhibit "B.", is hereunto annexed and made a part hereof, and pursuant to said Executive Order and the authority given in the Joint Resolution (Public resolution—No. 2—65th Congress), approved May 12, 1917, the possession and title of the aforementioned barges were taken over to the United States, by and [fol. 4] through the United States Shipping Board, without any agreement with claimant concerning the compensation to be paid it for its property so taken.

5. That said Joint Resolution, approved May 12, 1917, which authorized the President to take over to the United States the possession and title of certain vessels, prescribes certain uses to which said vessels so taken may be put and contemplates the presentation of

claims for compensation, and claimant reading into said Joint Resolution the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founds its claim, for which this suit is brought, upon said Act of August 29, 1916, and upon said provision of the Constitution of the United States, said Joint Resolution, and/or an implied contract with the Government of the United States, arising out of the facts herein stated and warranting the inference of an agreement on the part of said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has been deprived of the use of its property or for the time of the withholding of said price from claimant since the claim first accrued.

6. That no compensation has at any time been awarded or paid to claimant by the Government of the United States on this claim; that no action has been taken thereon in Congress or in any of the Executive Departments of the United States, other than that claimant has been advised by the Chairman of the United States Shipping [fol. 5] Board that for the want of specific legislative authority the United States Shipping Board cannot compensate claimant with respect to the subjects mentioned in this claim; and that no suit has been brought on this claim in any other court against any one acting for the Government of the United States.

7. That claimant is the sole owner of the claim set forth in this petition; that no assignment or tranfer of said claim or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that claimant believes the facts as stated in this petition to be true.

Wherefore, claimant prays for a judgment in its favor and against the United States of America in the sum of fourteen thousand, two hundred and fifty dollars ($14,250.00), it being the market value of said barges at or about the time they were taken into the custody of the United States of America, as aforesaid, plus interest upon said sum from the sixth day of April, A. D. 1917, the date when the possession of said barges was taken over to the United States, as aforesaid, and for such other and further relief as to this Honorable Court seems right and equitable.

[fol. 6] And, claimant will ever pray, etc.

Atlas Line Steamship Company, Claimant, by George W. Sterling, its Secretary and Treasurer. (Atlas Line Steamship Company Corporate Seal, 1903, N. J.) Charles H. Le Fevre, Attorn-y for Claimant.

Certificate to foregoing paper omitted in printing.

[fol. 7] EXHIBIT "A"—CERTIFICATE OF INCORPORATION

(Copy)

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning Corporations (Revision of 1896)" and the several Supplements thereto and Acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names.

I. The name of the corporation is Atlas Line Steamship Company.

II. The principal office in the state of New Jersey, is at No. 15 Exchange Place, Jersey City, County of Hudson, and is to be registered with the Corporation Trust Company of New Jersey. The name of the agent therein and in charge thereof and upon whom process against this corporation may be served, is the Corporation Trust Company of New Jersey.

III. The objects for which and for each or any of which the corporation is formed, are:

1. To do business generally as carriers of passengers and carriers and forwarders of cattle, goods, wares and merchandise and property and freight in general, by land, or water, including storing and warehousing the same, in the various countries hereinafter specified or referred to, upon the high seas and in the ports, harbors and island waters of said several countries and in that behalf or otherwise to build, construct, purchase, own, charter, operate, sell and lease railroads, canals, stations, depots, cars, locomotives, motors, ships, vessels, vessel property, barges tenders lighters and boats of any and every [fol. 8] nature, kind and description to be operated by steam, sail or otherwise, as well as wharves, piers, docks, warehouses, store houses, yards machinery and other terminal property, including lands, tenements and hereditaments in any and all such countries, colonies, dependencies and possessions and any and all equipment incidental to, necessary for and connected with the carrying on of such business or businesses, or any or all of them, excepting that the corporation shall not build, construct, operate or maintain a railroad or canal in the state of New Jersey,

2. To apply for and obtain from the Government of the United States of America, or from any other Government the registry, license or enrollment of such ships, vessels or boats of any and every name, nature and description, as may be built, acquired owned, chartered or operated by the corporation in and about its said business of transportation in and between the different ports of the United

States of America and their colonies, dependencies or possessions, and in and between ports of, or belonging to the United States and the ports of foreign countries, their colonies and dependencies, and in and between th ports of, or belonging to, foreign countries or otherwise.

3. To acquire the good will, business and property, real and personal, including assets of any and every description, and to assume the liabilities, of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of the corporation, or otherwise, and to secure the payment of any bonds or other evidences of indebtedness given therefor, by a mortgage or mortgages covering the real and personal property of the corporation or any part thereof.

4. To obtain in the United States of America or in any state thereof, or in the District of Columbia, or in any territory, colony, possession or dependency of the United States, or in any foreign country, a *character* or *characters* or other authorization requisite to [fol. 9] empower the corporation to construct, maintain, equip, operate, lease, or purchase, and sell or otherwise dispose of, a railroad or railroads, or a canal or canals, to be constructed, maintained or operated in any of said States, Districts, territories, dependencies, colonies or possessions or foreign countries excepting, however, the State of New Jersey.

IV. In furtherance and not in limitations of the general powers conferred by the laws of the State of New Jersey and of the objects and purposes as hereinabove stated, it is hereby further expressly provided that the company shall have the following additional and specific powers and objects, which shall not be held or taken to in any wise limit or restrict the objects or powers of the corporation, but shall be regarded as independent objects and powers, viz.:

1. To do any or all of the things hereinbefore or hereinafter set forth as objects, purposes, powers or otherwise, to the same extent, and as fully, as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

2. To conduct business in all its branches, to have one or more offices, and to hold, purchase and convey real and personal property without limit as to amount, within the State of New Jersey, the District of Columbia, and in all other states, territories, possessions, dependencies and colonies of the United States and in all foreign countries and places, but subject, always, to the laws thereof, respectively.

3. To manufacture, purchase or otherwise acquire, hold, own, mortgage, sell, assign and transfer invest, trade, deal in and with goods, wares and merchandise, real estate and personal property and any interests and rights therein and property of every class and description, without limit as to amount, within or without the State of New Jersey, and in any part of the world.

[fol. 10] 4. To apply for, obtain, register, purchase lease or otherwise acquire, and hold, own, use, operate, introduce, sell and assign, or otherwise dispose of any and all formulæ, trade-marks, trade-names and distinctive marks, and all inventions, improvements and processes used in connection with or secured under Letters Patent of the United States of America, or of any foreign country, and to use, exercise, develop, grant licenses in respect of or otherwise turn to account, any such trade-marks, trade-names, patents, licenses, concessions, processes and the like, or any such property, rights or inventions so acquired; and with a view to the working and developing of the same, to carry on any business, whether mining, manufacturing or otherwise, which the Corporation may think calculated, directly or indirectly, to effectuate these objects.

5. To hold, purchase, or otherwise acquire, to sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock, bonds, or other evidences of indebtedness created by any other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon in person or by proxy.

6. To purchase, lease, exchange, hire or otherwise acquire, any and all rights, privileges, permits or franchises, suitable or convenient for any of the purposes of its business; to erect and construct, make, maintain, improve, or aid or subscribe towards the construction, making, maintaining or improvement of, mills, factories, storehouses, buildings, roads, docks, piers, slips, wharves, ships, vessels, boats, houses for employes and others, and works and structures of all kinds; and in conjunction with and in furtherance of the general business and purposes of the corporation, as above described, to construct, purchase, lease, own, operate, sell and dispose of a railroad or railroads, canal or canals, or both in any state, dependency, colony [fol. 11] or country other than the State of New Jersey, subject to the laws of such other state or country, either directly or through the ownership of stock of a corporation formed or to be formed for the purpose under the laws of such other state or country.

7. To guarantee the payment of dividends or interest on any bonds, shares, stocks, debentures or other securities issued by, or any other contract or obligation of, any corporation whenever proper or necessary for the business of this corporation in the judgment of its Directors or the Executive Committee.

8. To make and enter into contracts of every sort and kind with any individual, firm, association or corporation, whether private, public or municipal, or body politic, including the Government of the United States, or of any State, District, territory, dependency, possession or colony thereof, and of any foreign country or any colony or dependency thereof.

9. In general to carry on any other business, whether manufacturing or otherwise, in connection with the foregoing, with all the powers now or hereafter conferred by the laws of New Jersey upon cor-

porations, or by the laws of any other state or government to which the corporation may become subject, and to do all and everything necessary, suitable or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to the benefit of the corporation, either as holders of, or interested in, any property or otherwise, including the issuance in that behalf of bonds, debentures and other evidences of indebtedness negotiable or otherwise and the securing the same by mortgage, pledge, or otherwise, without limit as to amount.

V. The total authorized capital stock of the corporation is Five hundred thousand (500,000) Dollars, divided into five thousand (5000) shares of One hundred (100) Dollars each.

[fol. 12] VI. The names of the incorporators, their Post Office addresses and the number of shares of stock subscribed for by each, the aggregate of which One thousand (1000) Dollars, is the amount of capital stock with which the corporation shall commence business, are as follows:

Name	P. O. address	No. of shares
Emil L. Boas.....	37 Broadway, New York, N. Y....	4
F. George Messmer..	207 Palisade Ave., West Hoboken, N. J.	3
Christian Diehl.....	126 W. 132d Street, New York, N. Y.	3

VII. The duration of the corporation shall be perpetual.

VIII. The Board of Directors shall have power:

1. Without the assent or vote of the stockholders, to fix the amount to be reserved as working capital.

2. To authorize, and to cause to be executed, mortgages, and liens without limit as to amount upon the real and personal property of the corporation.

3. With the consent in writing, or pursuant to the vote of the holders of a majority of the stock issued and outstanding or in accordance with the provisions of any By-Laws authorizing the same, to sell, assign, transfer or otherwise dispose of the whole property of the corporation, as an entirety.

4. From time to time to determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders. And no stockholder shall have any right of inspecting any account or book or document of this corporation, except as conferred by statute, or as authorized by the directors or by a resolution of the stockholders.

5. Without the assent or vote of the stockholders, to make, alter, amend and rescind the By-Laws of the corporation; but no By-Laws

shall be made by the Directors authorizing the said assignment, [fol. 13] transfer or other disposition of all the property of the corporation as an entirety, except pursuant to the vote or with the written consent of a majority of all the qualified Directors in office at the time.

6. To designate one or more of their number, from time to time, or at stated times, to constitute an Executive Committee, which Committee to the extent provided in the resolution, appointing the same, or by the By-Laws, shall have and may exercise the power of the Board of Directors and the management of the business and affairs of the corporation, and to authorize the seal of the corporation to be affixed to all papers which may require it.

7. To hold meetings, to have one or more offices, and to keep the books of the corporation, except the stock and transfer books, outside of the State of New Jersey, at such place or places as may from time to time be designated by the Board.

8. In addition to the powers by Statute and by the By-Laws expressly conferred, to exercise all such powers and do all such acts and things as may be exercised or done by the corporation, but subject nevertheless to the provisions of the Statute, of the Charter, and to any regulations that may from time to time be made by the stockholders, provided that no regulations so made shall invalidate, impair, or be contrary to any provisions of this Charter.

9. The Corporation reserves the right to amend, alter, or change any provisions contained in this certificate, in the manner prescribed by Statute, and all rights and estate of stockholders shall be subject to this reservation.

IX. The corporation may use and apply its surplus earnings or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock from time to time to such extent and in such manner and upon such terms as its Board of Directors shall determine; and [fol. 14] neither the property nor the capital stock so purchased and acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority of the Board of Directors.

X. The Corporation may by its By-Laws confer powers additional to the foregoing upon its directors, and may prescribe that less than a majority of their number to constitute a quorum at any meeting of the Board.

Witness the hands and seals of said incorporators this 20th day of June, 1903.

Emil L. Boas. (L. S.) F. G. Messmer. (L. S.) C. Diehl. (L. S.)

In Presence of: Julius J. Frank.

STATE OF NEW YORK,
County of New York, ss:

Be it known, that on this 20th day of June, in the year one thousand nine hundred and three, before me, Julius J. Frank, a Foreign Commissioner of Deeds for New Jersey in New York, residing in the city of New York, in the county of New York, in said State of New York, personally came Emil L. Boas, F. George Messmer, and Christian Diehl, who I am satisfied are the persons named in and who executed the foregoing instrument; and I having first made known to them the contents thereof, they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed my [fol. 15] official seal at New York, in the County and State aforesaid, the day and year last above written.

Julius J. Frank, a Foreign Commissioner of Deeds for New Jersey. (Seal.)

Registered in the office of the Company at Jersey City, in the County of Hudson, this 22nd day of June, 1903.

The Corporation Trust Company of New Jersey, Registered Agent, by Kenneth K. McLaren, Secretary.

Endorsed: "Received in the Hudson Co. N. J. Clerk's Office, June 22, A. D., 1903, and recorded in Clerk's Record No. on Page. Maurice J. Stack, Clerk. Filed Jun. 23, 1903. S. D. Dickinson, Secretary of State."

[fol. 16] EXHIBIT "B"—EXECUTIVE ORDER

Whereas the following Joint Resolution adopted by Congress was approved by the President May 12, 1917:

"Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall

be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized and directed to appoint, subject to the approval of the Presi-
[fol. 17] dent, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas the following vessels were, at the time of coming into the jurisdiction of the United States owned in whole or in part by corporation, citizen or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

Vaterland,	Neptun,
Amerika,	O. J. D. Ahlers,
Kaiser Wilhelm II,	Prinz Waldemar,
President Grant,	Loongmoon,
Pennsylvania,	Governor Jaeschke,
Bulgaria,	Darvel,
Prinzess Irene,	Princess Alice,
Hamburg,	Wiegand,
Neckar,	Bochum,
Bohemia,	Carl Diederichsen,
Rhaetia,	Coblenz,
Wittekind,	Esslingen,
Armenia,	Lyeemoon,
Adamsturm,	Pongtong,
Willehad,	Sachsen,
Serapis,	Suevia,
Allemannia,	Steinbeck,
Nassovia,	Elsass,
Maia,	Indra,
Arnoldus Vinnen,	Setos,
Ottawa,	Holsatia,
[fol. 18]	
Grunewald,	Staatssekretar Kraetke,
Sachsenwald,	Borneo,
Staatssekretar Solf,	Marudu,
Arcs (Lighter),	Tsintau,
George Washington,	Andalusia,

Kronprinzessin Cecile,
President Lincoln,
Cincinnati,
Grosser Kurfurst,
Barbarossa,
Friedrich der Grosse,
Rhein,
Konig Wilhelm II,
Koln,
Prinz Oskar,
Ockenfels,
Arcadia,
Pisa,
Prinz Joachim,
Harburg,
Portonia,
Clara Mennig,
Pommern,
Camilla Rickmers,
Clara Jebsen,
Elmsborn,
Johanne,
Mark,
Rajah,
Sambia,
Tubingen,
Dalbek,
Magdeburg,
Matador,
Kurt,
Andromeda,
Prinz Sigismund,
Savoia,
Arni (Lighter),
Argus (Lighter).

It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth.

Woodrow Wilson.

The White House, 30 June, 1917.

[fol. 19] III. Defendant's Demurrer—Filed May 26, 1923

(Note.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendant, and by Mr. Charles H. Le Fevre, on Feb. 20, for the plaintiff in this case, and the demurrer was submitted.

V. Order of Court Dismissing Amended Petition and Memorandum—Entered March 17, 1924.

This case was submitted upon the defendant's demurrer to the plaintiffs' amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, It is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is sustained, and the amended petition is dismissed.

Memorandum

The court decides it is without jurisdiction to hear and determine this case. Reference is made for its reasons to the court's opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

[fol. 20] VI. Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reo-onable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey re-

quired by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 21] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, 237 [fol. 22] U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8,

cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the [fol. 23] court is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co.

Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 24] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klien's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sov-

ereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case. 13 Wall, 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315. 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion. reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 25] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis. in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A

sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 26] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was

said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 27] VII. Proceedings After Entry of Judgment

On May 15, 1924, the plaintiff filed a motion for a new trial. On May 26, 1924, the court filed an order overruling said motion.

VIII. Plaintiff's Application for Appeal—Filed June 4, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, and from the decree entered in said cause on the twenty-sixth day of May, 1924, overruling claimant's motion for a new trial, the claimant, by its attorney, on this fourth day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Charles H. Le Fevre, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 28] [Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the proceedings after entry of judgment; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighteenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,442. Court of Claims. Term No. 477. Atlas Line Steamship Company, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,442.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 192~~5~~ 7

No. ~~475~~ ~~44~~ ~~75~~ 6

ATLAS LINE STEAMSHIP COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1924

(30,443)

(30,443)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 478

ATLAS LINE STEAMSHIP COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] **IN THE COURT OF CLAIMS**

ATLAS LINE STEAMSHIP COMPANY, a Corporation,

vs.

THE UNITED STATES OF AMERICA

PETITION—Filed April 5, 1923

To the Honorable the Court of Claims:

The claimant, Atlas Line Steamship Company, respectfully represents:

1. That claimant is a corporation created by and existing under the laws of the State of New Jersey; that a copy of its Certificate of Incorporation , marked Exhibit "A," is hereunto annexed and made a part hereof; that it was organized on the twenty-third day of June, A. D. 1903, to exercise and perform the powers conferred upon it by said laws and to carry on any business or occupation necessary and proper to effectuate any or all of the objects for which it was formed; that from the date of such organization until a declaration of war by the United States of America against the Imperial German Government on the sixth day of April, A. D. 1917, made trading with Germany and its nationals unlawful on the part of persons in the United States, claimant was a subsidiary corporation of the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, a German corporation engaged in the business of maritime transportation and known commonly in said business as the Hamburg-American [fol. 2] Line," in that all of the issued and outstanding capital stock of claimant was during such period beneficially held for said German corporation; that said stock continued to be so held until sometime in or about the month of December, A. D. 1917, when said stock was seized and taken over by the Alien Property Cutodian, and has since then been held under the control and management of said Alien Property Custodian, pursuant to the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, the amendments thereto and the Executive Orders issued in pursuance thereof; and that all members of claimant's board of directors, as at present constituted, hold office as such by virtue of their having been regularly elected directors by the vote of said Alien Property Custodian and his nominees at a stockholders' meeting held at claimant's registered office, No. 15 Exchange Place, Jersey City, New Jersey, on the sixth day of September, A. D. 1922.

2. That on the second day of April, A. D. 1917, claimant for a consideration of two million two hundred and fifty thousand dollars ($2,250,000.00), paid or secured to be paid to the said "Hamburg-American Line," purchased of said "Hamburg-American Line" five steamships, named "Nassovia," "Armenia," "Arcadia," Savoia," and

"Saxonia," and valued at $450,000.00, $475,000.00, $450,000.00, $325,000.00, and $550,000.00, respectively; that claimant acquired title to said steamships by and through a Bill of Sale, a copy whereof, marked Exhibit "B," is hereunto annexed and made a part hereof; [fol. 3] and that claimant was the owner of all of said steamships at the time or times when the possession and title of said steamships was taken over to the United States as hereinafter mentioned.

3. That on the sixth day of April, A. D. 1917, all of said steamships were taken into the custody of the United States of America by the Treasury Department through customs officials, the "Nassovia" and "Armenia" at the Port of New York, State of New York; the "Arcadia" in the port at Norfolk, State of Virginia; the "Savoia" in the waters of the Canal Zone, and the "Saxonia" in the port at Seattle, State of Washington, all of said steamships then being German-registered vessels.

4. That the vessel "Saxonia" is included in an Executive Order made on the twenty-second day of May, 1917, and the vessels "Nassovia," "Armenia," "Arcadia," and "Savoia" are included in an Executive Order made on the thirtieth day of June, 1917, copies of which Executive Orders, marked Exhibit "C" and Exhibit "D," respectively, are hereunto annexed and made a part hereof, and pursuant to said Executive Orders and the authority given in the Joint Resolution (Public Resolution, No. 2, 65th Congress), approved May 12, 1917, the possession and title of the aforementioned vessels were taken over to the United States, without any agreement with claimant concerning the compensation to be paid it for its property so taken.

5. That said Joint Resolution, approved May 12, 1917, which authorized the President to take over to the United States the posses- [fol. 4] sion and title of said vessels, prescribes certain uses to which said vessels so taken may be put and contemplates the presentation of claims for compensation, and claimant reading into said Joint Resolution the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founds its claim, for which this suit is brought, upon said provision of the Constitution of the United States, said Joint Resolution, and/or an implied contract with the Government of the United States, arising out of the facts herein stated and warranting the inference of an agreement on the part of said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has been deprived of the use of its property or for the time of the withholding of said price from claimant since the claim first accrued.

6. That no compensation has at any time been awarded or paid to claimant by the Government of the United States on this claim; that no action has been taken thereon in Congress or in any of the Executive Departments of the United States, other than that claimant

has been advised by both the Secretary of the Navy and the Chairman of the United States Shipping Board that for the want of specific legislative authority the Departments which they respectively represent cannot compensate claimant with respect to the subject mentioned in this claim; and that no suit has been brought on this claim in any other court against any one acting for the Government of the United States.

[fol. 5] 7. That claimant is the sole owner of the claim set forth in this petition; that no assignment or transfer of said claim or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that claimant believes the facts as stated in this petition to be true.

Wherefore, claimant prays for a judgment in its favor and against the United States of America in the sum of three million seven hundred ninety thousand, three hundred and thirty-five dollars ($3,790,335.00), being the total of the market values of said steamships at the times when the title of each was taken over to and was acquired by the United States, as follows, to-wit:

"Nassovia," on June 30, 1917	$752,500.00
"Armenia," on June 30, 1917	816,200.00
"Arcadia," on June 30, 1917	899,910.00
"Savoia," on June 30, 1917	386,175.00
"Saxonia," on May 22, 1917	935,550.00
Total	$3,790,335.00

plus interest upon the sum of two million, eight hundred fifty-four thousand, seven hundred and eighty-five dollars ($2,854,785.00), from June 30, 1917, the date when titles of the said "Nassovia," "Armenia," "Arcadia," and "Savoia," were taken over to the United States, and plus interest on the sum of nine hundred thirty-five [fol. 6] thousand, five hundred and fifty dollars ($935,550.00), from May 22, 1917, the date when the title of the said "Saxonia" was taken over to the United States, and claimant prays for such other and further relief as to the Honorable Court seems right and quitable.

And claimant will ever pray, etc.

Atlas Line Steamship Company, Claimant, by George W. Sterling, its Secretary and Treasurer. (Atlas Line Steamship Company Corporate Seal, 1903, N. J.) Charles H. Le Fevre, Attorney for Claimant.

Certificate to foregoing paper omitted in printing.

[fol. 7] EXHIBIT "A"—CERTIFICATE OF INCORPORATION

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations (Revision of 1896)" and the several Supplements thereto and Acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names.

I. The name of the corporation is Atlas Line Steamship Company.

II. The principal office in the state of New Jersey, is at No. 15 Exchange Place, Jersey City, County of Hudson, and is to be registered with the Corporation Trust Company of New Jersey. The name of the agent therein and in charge thereof and upon whom process against this corporation may be served, is the Corporation Trust Company of New Jersey.

III. The objects for which and for each or any of which the corporation is formed, are:

1. To do business generally as carriers of passengers and carriers and forwarders of cattle, goods, wares and merchandise and property and freight in general, by land, or water, including storing and warehousing the same, in the various countries hereinafter specified or referred to, upon the high seas and in the ports, harbors and island waters of said several countries, and in that behalf or otherwise to build, construct, purchase, own, charter, operate, sell and lease railroads, canals, stations, depots, cars, locomotives, motors, ships, vessels, vessel property, barges, tenders, lighters and boats of any and every nature, kind and description to be operated by steam, sail or [fol. 8] otherwise, as well as wharves, piers, docks, warehouses, store houses, yards, machinery and other terminal property, including lands, tenements and hereditaments in any and all such countries, colonies, dependencies and possessions and any and all equipment incidental to, necessary for and connected with the carrying on of such business or businesses, or any or all of them, excepting that the corporation shall not build, construct, operate or maintain a railroad or canal in the state of New Jersey.

2. To apply for and obtain from the Government of the United States of America, or from any other Government the registry, license or enrollment of such ships, vessels or boats of any and every name, nature and description, as may be built, acquired, owned, chartered or operated by the corporation in and about its said business of transportation in and between the different ports of the United States of America and their colonies, dependencies or possessions, and in and between ports of, or belonging to the United States and the ports of foreign countries, their colonies and dependencies, and in and between the ports of, or belonging to, foreign countries or otherwise.

3. To acquire the good will, business and property, real and personal, including assets of any and every description, and to assume the liabilities, of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of the corporation, or otherwise, and to secure the payment of any bonds or other evidences of indebtedness given therefor, by a mortgage or mortgages covering the real and personal property of the corporation or any part thereof.

4. To obtain in the United States of America or in any state thereof, or in the District of Columbia, or in any territory, colony, possession or dependency of the United States, or in any foreign country a *character* or *characters* or other authorization requisite [fol. 9] to empower the corporation to construct, maintain, equip, operate, lease or purchase, and sell or otherwise dispose of, a railroad or railroads, or a canal or canals, to be constructed, maintained or operated in any of said States, Districts, territories. dependencies, colonies or possessions or foreign countries, excepting, however, the State of New Jersey.

IV. In furtherance and not in limitations of the general powers conferred by the laws of the State of New Jersey and of the objects and purposes as hereinabove stated, it is hereby further expressly provided that the company shall have the following additional and specific powers and objects, which shall not be held or taken to in any wise limit or restrict the objects or powers of the corporation, but shall be regarded as independent objects and powers, viz:

1. To do any or all of the things hereinbefore or hereinafter set forth as objects, purposes, powers or otherwise, to the same extent, and as fully, as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

2. To conduct business in all its branches, to have one or more offices, and to hold, purchase and convey real and personal property without limit as to amount, within the State of New Jersey, the District of Columbia, and in all other states, territories, possessions, dependencies and colonies of the United States and in all foreign countries and places, but subject, always, to the laws thereof, respectively.

3. To manufacture, purchase or otherwise acquire, hold, own, mortgage, sell, assign and transfer, invest, trade, deal in and with goods, wares and merchandise, real estate and personal property and any interests and rights therein and property of every class and description, without limit as to amount, within or without the State of New Jersey, and in any part of the world.

[fol. 10] 4. To apply for, obtain, register, purchase, lease or otherwise acquire, and hold, own, use, operate, introduce, sell and assign, or otherwise dispose of any and all formulæ, trade-marks, tradenames and distinctive marks, and all inventions, improvements and processes used in connection with or secured under Letters Patent of the United States of America, or of any foreign country, and to use, exercise, develop, grant licenses in respect of, or otherwise turn to

account, any such trade-marks, trade-names, patents, licenses, concessions, processes and the like, or any such property, rights or inventions so acquired; and with a view to the working and developing of the same, to carry on any business, whether mining, manufacturing or otherwise, which the Corporation may think calculated, directly or indirectly, to effectuate these objects.

5. To hold, purchase, or otherwise acquire, to sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock, bonds, or other evidences of indebtedness created by any other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon in person or by proxy.

6. To purchase, lease, exchange, hire or otherwise acquire, any and all rights, privileges, permits or franchises, suitable or convenient for any of the purposes of its business; to erect and construct, make, maintain, improve, or aid or subscribe towards the construction, making, maintaining or improvement of, mills, factories, store-houses, buildings, roads, docks, piers, slips, wharves, ships, vessels, boats, houses for employes and others, and works and structures of all kinds; and in conjunction with and in furtherance of the general business and purposes of the corporation, as above described, to construct, purchase, lease, own, operate, sell and dispose of a railroad or railroads, canal or canals, or both in any state, dependency, colony or country [fol. 11] other than the State of New Jersey, subject to the laws of such other state or country, either directly or through the ownership of stock of a corporation formed or to be formed for the purpose under the laws of such other state or country.

7. To guarantee the payment of dividends or interest on any bonds, shares, stocks, debentures or other securities issued by, or any other contract or obligation of, any corporation whenever proper or necessary for the business of this corporation in the judgment of its Directors or the Executive Committee.

8. To make and enter into contracts of every sort and kind with any individual, firm, association or corporation, whether private, public or municipal, or body politic, including the Government of the United States, or of any State, District, territory, dependency, possession or colony thereof, and of any foreign country or any colony or dependency thereof.

9. In general, to carry on any other business, whether manufacturing or otherwise, in connection with the foregoing, with all the powers now or hereafter conferred by the laws of New Jersey upon corporations, or by the laws of any other state or government to which the corporation may become subject, and to do all and everything necessary, suitable or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to the benefit of the corporation, either as hoders of, or interested in, any property or otherwise, including the issuance in that behalf of bonds,

debentures and other evidences of indebtedness negotiable or otherwise and the securing the same by mortgage, pledge, or othewise, without limit as to amount.

V. The total authorized capital stock of the corporation is Five hundred thousand (500,000) Dollars, divided into five thousand (5,000) shares of One hundred (100) Dollars each.

[fol. 12] VI. The names of the incorporators, their Post Office addresses and the number of shares of stock subscribed for by each, the aggregate of which One thousand (1,000) Dollars, is the amount of capital stock with which the corporation shall commence business, are as follows:

Name	P. O. address	No. of shares
Emil L. Boas.....	37 Broadway, New York, N. Y.....	4
F. George Messmer....	207 Palisade Ave., West Hoboken, N. J.	3
Christian Diehl.....	126 W. 132d Street, New York, N. Y...	3

VII. The duration of the corporation shall be perpetual.

VIII. The Board of Directors shall have power:

1. Without the assent or vote of the stockholders, to fix the amount to be reserved as working capital.

2. To authorize, and to cause to be executed, mortgages, and liens without limit as to amount upon the real and personal property of the corporation.

3. With the consent in writing, or pursuant to the vote of the holders of a majority of the stock issued and outstanding or in accordance with the provisions of any By-Laws authorizing the same, to sell, assign, transfer or otherwise dispose of the whole property of the corporation, as an entirety.

4. From time to time to determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders. And no stockholder shall have any right of inspecting any account or book or document of this corporation, except as conferred by statute, or as authorized by the directors or by a resolution of the stockholders.

5. Without the assent or vote of the stockholders, to make, alter, amend and rescind the By-Laws of the corporation; but no By-Laws shall be made by the Directors authorizing the said assignment, trans-
[fol. 13] fer or other disposition of all the property of the corporation as an entirety, except pursuant to the vote or with the written consent of a majority of all the qualified Directors in office at the time.

6. To designate one or more of their number, from time to time, or at stated times, to constitute an Executive Committee, which Committee to the extent provided in the resolution, appointing the same,

or by the By-Laws, shall have and may exercise the power of the Board of Directors and the management of the business and affairs of the corporation, and to authorize the seal of the corporation to be affixed to all papers which may require it.

7. To hold meetings, to have one or more offices, and to keep the books of the corporation, except the stock and transfer books, outside of the State of New Jersey, at such place or places as may from time to time be designated by the Board.

8. In addition to the powers by Statute and by the By-Laws expressly conferred, to exercise all such powers and do all such acts and things as may be exercised or done by the corporation, but subject nevertheless to the provisions of the Statute, of the Charter, and to any regulations that may from time to time be made by the stockholders, provided that no regulations so made shall invalidate, impair, or be contrary to any provisions of this Charter.

9. The Corporation reserves the right to amend, alter, or change any provisions contained in this certificate, in the manner prescribed by Statute, and all rights and estate of stockholders shall be subject to this reservation.

IX. The corporation may use and apply its surplus earnings or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock from time to time to such extent and in such manner and upon such terms as its Board of Directors shall de- [fol. 14] termine; and neither the property nor the capital stock so purchased and acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority of the Board of Directors.

X. The Corporation may by its By-Laws confer powers additional to the foregoing upon its directors, and may prescribe that less than a majority of their number to constitute a quorum at any meeting of the Board.

Witness the hands and seals of said incorporators this 20th day of June, 1903.

Emil L. Boas. (L. S.) F. G. Messmer. (L. S.) C. Diehl. (L. S.)

In Presence of Julius J. Frank.

STATE OF NEW YORK,
County of New York, ss:

Be it known, that on this 20th day of June, in the year one thousand nine hundred and three, before me, Julius J. Frank, a Foreign Commissioner of Deeds for New Jersey in New York, resid-

ing in the city of New York, in the county of New York, in said State of New York, personally came Emil L. Boas, F. George Messmer, and Christian Diehl, who I am satisfied are the persons named in and who executed the foregoing instrument; and I having first made known to them the contents thereof, they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed my [fol. 15] official seal at New York, in the County and State aforesaid, the day and year last above written.

Julius J. Frank, a Foreign Commissioner of Deeds for New Jersey. (Seal.)

Registered in the office of the Company at Jersey City, in the County of Hudson, this 22nd day of June, 1903.

The Corporation Trust Company of New Jersey, Registered Agent, by Kenneth K. McLaren, Secretary.

Endorsed: "Receiver in the Hudson Co. N. J. Clerk's Office, June 22, A. D., 1903, and recorded in Clerk's Record No. —, on Page —. Maurice J. Stack, Clerk. Filed Jun. 23, 1903. S. D. Dickinson, Secretary of State.".

[fol. 16] EXHIBIT "B"—BILL OF SALE

Sale of Steamship- Nassovia, Armenia, Arcadia, Savoia, Saxonia from Hamburg Amerikanische Packet-Fahrt Aktien Gesellschaft to Atlas Line Steamship Company

To all to whom these presents shall come, Greeting:

Know ye, That the Hamburg Amerikanische Packetfahrt Aktien Gesellschaft, a corporation organized and existing under and by virtue of the laws of the empire of Germany, having its principal place of business at Hamburg, Germany, and an office with Resident Directors in charge in New York City, sole owner of the German steamships Nassovia and Armenia, now lying in the port of New York, Arcadia, now lying in the port of Newport News or Norfolk, Virginia, Savoia, now lying in the port of Colon, Panama Canal Zone and Saxonia, now lying in the port of Seattle, Washington.

For and in consideration of the sum of two million two hundred and fifty thousand dollars ($2,250,000) lawful money of the United States, to be paid to it by the Atlas Line Steamship Company, a corporation duly organized and existing under the laws of the State of New Jersey, which sum has been paid by the delivery of the promissory note of the Atlas Steamship Company, dated this day, for the said sum of two million two hundred and fifty thousand dollars ($2,250,000) payable one year from this date, and which note is secured by a chattel mortgage upon the said steamships,

[fol. 17] Has bargained and sold, and by these presents does bargain and sell unto the said Atlas Line Steamship Company, its successors and assigns, all its right, title and interest in and to the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them and all the shares in the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them, whether divided into sixty-fourths or otherwise, and in their and each of their engines, boilers, machinery, boats, anchors, cables, tackle, furniture, apparel and appurtenances, provisions, supplies, stores and all other property thereon belonging to the said Hamburg Amerikanische Packetfahrt Aktien Gesellschaft.

To have and to hold the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them and all the said shares in them and their and each of their boats, anchors, cables, tackle, engines, boilers, machinery, furniture, apparel and appurtenances, provisions, supplies, stores and all other property thereon belonging to the said Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, unto the said Atlas Line Steamship Company, its successors and assigns, and for the sole and proper use, benefit and behoof of the said Atlas Line Steamship Company, its successors and assigns, and the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft hereby covenants and agrees for itself, its successors and assigns, well and truly to indemnify and save harmless the said Atlas Line Steamship Company, its successors and assigns, from all and all manner of liens and encumbrances, whether maritime or otherwise, which may be outstanding against, or may have been incurred by the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia or any of them by reason of any matter or thing whatsoever, up to the time of the delivery of this Bill of Sale, and from all actions, suits, [fol. 18] damages, costs and expenses which may hereafter be incurred by the said Atlas Line Steamship Company, its successors and assigns, by reason of any lien or claim of lien, or encumbrance or claim of encumbrance on or against the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia or any of them, in respect of any matter or thing whatsoever up to the time of the delivery of this Bill of Sale.

And the said Hamburg-Amerikanische Packetfahrt Atkien Gesellschaft further warrants and by these presents does covenant and agree for and on behalf of itself, its successors and assigns, to and with the said Atlas Line Steamship Company, to warrant and defend that it is the owner of the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them and all shares in the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them and their appurtenances aforesaid, and has good right and power to convey, sell and transfer the same; that the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them and their appurtenances are free from all liens and encumbrances of whatever nature or kind, and that it will forever warrant title to the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and to the said appurtenances.

And the said Hamburg-Americanische Packetfahrt Atkien Gesellschaft further covenants and agrees for itself its successors and assigns, that it will, whenever requested by the said Atlas Line Steamship Company, its successors or assigns, execute, acknowledge and deliver such other or further Bills of Sale, or other document of title as may be required, and will, at its own charges, close out the German registry of the said steamships Nassovia, Armenia, Arcadia, Savoia, Saxonia and each of them.

In testimony whereof, the said Hamburg-Amerikanische Packet- [fol. 19] fahrt Aktien Gesellschaft has caused these presents to be executed by its attorneys in fact and its corporate seal to be hereunto affixed and attested this second day of April, 1917, at the city of New York.

Hamburg Amerikanische Packetfahrt Aktien Gesellschaft,
per (Sgd.) J. P. Meyer, W. G. Sickel, Attorneys in Fact.

Witness: (Sgd.) C. L. Schurz, A. L. Cronemeyer.

On this 2nd? day of April, in the year one thousand and nine hundred and seventeen, before me personally came Julius P. Meyer and William G. Sickel, the attorneys in fact of the Hamburg-Amerikanische Packetfahrt A*th*ien Gesselschaft (otherwise known in the United States a*t* the Hamburg-American Packet Company), to me personally known and known to me to be the individuals described in and who as such attorneys in fact executed the foregoing Bill of Sale, and severally acknowledged that they executed the same as and for the act and deed of the said Hamburg-Amerikanische Packetfahrt Aktien Gesselschaft, therein described, and for the purpose therein mentioned, by virtue of a certain power of attorney duly executed by the said Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft of the said Julius P. Meyer, then of Jersey City, State of New Jersey, William G. Sickel then of Short Hills, State of New Jersey, or Emil Lederer, of New York City, (two always to act jointly, the joint act of any two to be valid and binding, but the act of any one acting alone to be void), bearing date the 6th day of May, 1912, and recorded in the office of the Register in and for the city and county of New York, Borough of Manhattan, on the 19th day [fol. 20] of March, 1915, in Liber 23? of Powers of Attorney at page 95; and the said Julius P. Meyer and William G. Sickel, each to me personally as aforesaid, being by me severally duly sworn, did each of them severally depose and say as follows: that they are the attorneys in fact of the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, the corporation described in and which executed the foregoing Bill of Sale; that they know the corporate seal of the said corporation; that the seal affixed to the said instrument was the said corporate seal and that said seal was affixed to the said instrument by virtue of the authority given to them as attorneys in fact of the said company under the power of attorney above mentioned, that they signed the corporate name to the said Bill of Sale under the like authority, as the free act and deed of the Hamburg-Ameri-

kanische Packetfahrt Atkien Gesellschaft, for the consideration therein expressed, and that a duly certified copy of said power of attorney is hereto annexed.

(Sgd.) C. L. Shurz, Notary Public, New York County.

Know all men by these presents, That the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft (Hamburg-Amerika Linie), otherwise known in the United States as the Hamburg-American Line or Hamburg-American Packet Company, has made, constituted and appointed, and by these presents does make, constitute and appoint Julius P. Meyer, of Jersey City, State of New Jersey, William G. Sickel, of Short Hills, State of New Jersey, and Emil Lederer, of New Sork City, its true and lawful attorneys (two always to act jointly, the joint act of any two to be valid and binding, the act of any one acting alone to be void) for it and in its name, place and stead—

(1) To ask, demand, sue for, collect and receive, all sums of money, debts, accounts and other funds and demands whatsoever, [fol. 21] which are or shall become due, owing or payable to this company, and upon receipt thereof to give acquittances, receipts or other sufficient discharges, and to deposit such moneys in the bank, and therefor to sign, endorse, discount, draw, accept, make, execute and deliver checks, drafts, bills of exchange, and to draw against such funds by checks, draft or bill for the company's use.

(2) To care for, protect, control, manage and direct the company's property, and to buy, let, charter, transfer, sell and execute bills of sale for ships, vessels, tugs, lighters, and all manner of floating property; to buy, lease, grant, bargain, sell and execute deeds for real estate, as may become necessary for the prosecution of the company's business.

(3) To appoint, discharge and instruct agents, and to require accountings from them.

(4) To enter, prosecute or defend all civil, criminal, oral, summary, voluntary or other suits, and to compromise, abandon and discontinue the same; to grant releases and satisfy judgments, and to have authority in regard to all judicial matters.

(5) To settle claims and differences between the company and other companies and persons by compromise, and to submit the same to arbitration.

(6) To contract for and purchase supplies and materials and to employ services and labor.

(7) To sign, seal and deliver in the name of the company bonds and other contracts of security at the custom house, in arbitration suits and legal proceedings, and as indemnity, and for that purpose to secure bondsmen and indemnify them, and to do and perform all other matters and things necessary to the proper and efficient

transaction of the company's business in the United States, giving and granting unto the said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and [fol. 22] necessary to be done in and about the premises as fully to all intents and purposes as it might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorneys or their substitutes shall lawfully do or cause to be done by virtue hereof.

In witness whereof, the said Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft (The Hamburg-American Line) has caused its corporate seal to be hereunto affixed, and these presents to be signed by one of its Directors and its General Counsel holding power of attorney and duly authorized to execute the same, this 6th day of May, 1912.

Hamburg American Line. Julius Thomann, Director. Albert Hopff, General Counsel. (Corporate Seal Hamburg Amerikanische Packetfahrt Actien Gesellschaft (Hamburg American Line.)

(Acknowledgment)

STATE OF NEW YORK,
County of New York:

On this 6th day of May 1912 * * * (illegible.)

REGISTER'S OFFICE

COUNTY OF NEW YORK,
State of New York:

I, John J. Hopper, Register of the said County, have compared [fol. 23] the annexed copy with an instrument recorded in this office, on the 19th day of March A. D. 1913 at 3 o'clock 14 min. P. M. in Liber 23, of Power of Attorney (New Series) at page 95 and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

In testimony whereof, I have hereunto subscribed my name, and set my official seal, this 28th day of ——, ——.

Jno. J. Hopper, J. Chas. Walton. (Seal.)

[fol. 24] (EXHIBIT "C")—EXECUTIVE ORDER MAY 22, 1917

In accordance with a request of the Secretary of the Navy, concurred in by the United States Shipping Board, the Secretary of the Treasury is hereby directed to transfer the following German vessels to the Navy for use as colliers and cargo carriers: Hohenfelde, Frieda Leonhardt, Nicaria, Kiel, Rudolf Blumberg, Vogesen, Breslau, Saxonia.

Woodrow Wilson.

The White House, 22 May, 1917.

[fol. 25] EXHIBIT "D"—EXECUTIVE ORDER JUNE 30, 1917

Whereas the following Joint Resolution adopted by Congress was approved by the President May 12, 1917:

"Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized and directed to appoint, subject to the approval of the Presi-
[fol. 26] dent, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas the following vessels were, at the time of coming into the jurisdiction of the United States owned in whole or in part by a corporation, citizen or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

Vaterland,
Amerika,
Kaiser Wilhelm II,
President Grant,
Pennsylvania,
Bulgaria,
Prinzess Irene,
Hamburg,
Neckar,
Neptun,
O. J. D. Ahlers,
Prinz Waldemar,
Loongmoon,
Governor Jaeschke,
Darvel,
Princess Alice,
Wiegand,
Bochum,

Bohemia,
Rhaetia,
Wittekind,
Armenia,
Adamsturm,
Willehad,
Serapis,
Allemannia,
Nassovia,
Maia,
Arnoldus Vinnen,
Ottawa,

[fol. 27]

Grunewald,
Sachsenwald,
Staatssekretar Solf,
Aroa (Lighter)
George Washington,
Kronprinzessin Cecile,
President Lincoln,
Cincinnati,
Grosser Kurfurst,
Barbarossa,
Friedrich der Grosse,
Rhein,
Konig Wilhelm II,
Koln,
Prinz Oskar,
Ockenfels,
Arcadia,
Pisa,
Prinz Joachim,
Harburg,
Portonia,
Clara Mennig,
Pommern,
Carl Diederichsen,
Coblenz,
Esslingen,
Lyeemoon,
Pongtong,
Sachsen,
Suevia,
Steinbeck,
Elsass,
Indra,
Setos,
Holsatia,

Staatssekretar Kraetke,
Borneo,
Marudu,
Tsintau,
Andalusia,
Camilla Rickmers,
Clara Jebsen,
Elmsborn,
Johanne,
Mark,
Rajah,
Sambia,
Tubingen,
Dalbek,
Magdeburg,
Matador,
Kurt,
Andromeda,
Prinz Sigismund,
Savoia,
Arni (Lighter),
Argus (Lighter)

It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth.

Woodrow Wilson.

The White House, 30 June, 1917.

[fol. 28] II. Defendant's Demurrer—Filed May 26, 1923

Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

III. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendant, and by Mr. Charles H. Le Fevre, on Feb. 20, for the plaintiff in this case, and the demurrer was submitted.

IV. Order of Court Dismissing Petition and Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is hereby sustained, and the petition is dismissed.

Memorandum

1. The action sounds in tort. Ribas v. Hijo Case, 194 U. S., 315; Herrera Case, 222 U. S., 558.

2. The court is without jurisdiction. Cases supra. See also opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

[fol. 29] V. Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in

the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 30] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular

possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to acomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 31] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or

a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court is [fol. 32] asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of juris-

diction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall, 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace

a right of action against the Government under the mandate of the Constitution that private property should not be taken for public use [fol. 33] without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concorned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar vs. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43, C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's

power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 34] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section

5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 35] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the court, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 36] VI. Plaintiff's Application for Appeal—Filed June 4, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, the claimant, by its attorney, on this fourth day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Charles H. Le Fevre, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 37] [Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighteenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,443. Court of Claims. Term No. 478. Atlas Line Steamship Company, Appellant, vs. The United States. Filed June 25th, 1924. File No. 30,443.

OLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. 470

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 22, 1926

(30,444)

(30,444)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 479

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

NORTH GERMAN LLOYD

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed Feb. 19, 1923

To the Honorable the Court of Claims:

The claimant, North German Lloyd, respectfully represents:

1. That it is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Free and Hanseatic City of Bremen in Germany and of Germany, named and known in the German language as Norddeutscher Lloyd and in the English language as North German Lloyd, and is, and was at all times hereinafter mentioned, a citizen or subject of the German Government.

2. That the German Government accords to citizens of the United States the right to prosecute claims against it in its courts.

3. That continuously from the year 1857 to about the end of the month of July, 1914, claimant maintained regular steamship services [fol. 2] between its home port of Bremen and other foreign ports and the port of New York in the United States of America, which services were interrupted at the time last mentioned by the outbreak of war between Germany and other European powers.

4. That at various times between the years 1857 and 1900 claimant had acquired by purchase certain adjoining parcels of land and real estate, with piers and other improvements erected thereon, situate on the Hudson River in the City of Hoboken, County of Hudson and State of New Jersey, and used the same as its terminal at the port of New York.

5. That in 1900 its docks and piers were entirely destroyed by fire, and as a convenience in the rebuilding of the same claimant caused to be organized, under the laws of the State of New Jersey, a corporation named and known as the North German Lloyd Dock Company, which said last named corporation was in existence at all the

times hereinafter mentioned, and all of the stock of which was owned and controlled by claimant and stood in the name of claimant, with the exception of three shares which were controlled by complainant but stood in the names of three individuals to qualify them as directors of said corporation.

6. That after the organization of said North German Lloyd Dock Company claimant conveyed to it all of its above mentioned real estate and caused to be constructed on the same an entirely new steamship terminal, consisting of three large piers, one large bulk-[fol. 3] head building, a superintendent's residence, and various other buildings, structures and improvements, in which were installed machinery, appliances and equipment essential to constitute a complete and fully equipped steamship terminal, the cost thereof being paid in part by $2,000,000 raised upon a mortgage on said property given by the said North German Lloyd Dock Company, and as to the remainder by funds advanced by claimant.

The newly constructed steamship terminal described in the last paragraph is the same property that is described in an Act of Congress approved March 28, 1918 (being a section of the Urgent Deficiency Act approved on said date) as "the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company," by which description the said property will be hereinafter referred to.

7. That by a written lease dated March 20, 1903, the said North German Lloyd Dock Company let and demised the said premises and property mentioned in the preceding paragraph to the claimant, North German Lloyd, for a term of 999 years, and claimant at once entered into possession of said property under said lease.

8. That on April 6, 1917, claimant was in exclusive and peaceable possession of the said docks, piers, warehouses, wharves and terminal equipment and facilities on the Hudson River, under and by virtue of the lease mentioned in the preceding paragraph.

[fol. 4] 9. That on said April 6, 1917, said docks, piers, warehouses, wharves and terminal equipment and facilities on the Hudson River were entered upon by the United States of America, acting by and through the War Department and the military forces, and possession thereof taken by the United States of America (without, however, excluding claimant from said premises), and troops were quartered in and upon said premises and property and other use was made thereof by the United States of America. On or about April 20, 1917, the United States of America, acting by and through the War Department and the military forces, and under the authority of the Act of Congress of August 29, 1916, c. 418, Sec. 1, (39 Stat. 645), assumed complete and exclusive possession, control and use of the said premises and property and ejected and excluded claimant, its officers, agents and servants therefrom; and claimant has ever since been excluded from and deprived of the possession and use of said premises and property, and the United States of America,

by itself and its lessees, has had the exclusive use and possession thereof.

10. That on June 28, 1918, the United States of America, acting by and through the President of the United States of America, and under authority, or color of authority, of the Act of Congress first above mentioned, approved March 28, 1918, expropriated the said premises and property hereinbefore mentioned and the title thereof, and took unto itself title thereto.

11. That on December 3, 1918, the United States of America, acting by and through the President of the United States of America [fol. 5] and under authority, or color of authority, of said Act of Congress, approved March 28, 1918, awarded compensation for the title of said premises and property by it expropriated as aforesaid.

12. That no compensation has at any time been awarded or paid by the United States of America for the use of said premises and property from the date of the original taking of possession and use thereof by the United States of America, namely, April 6, 1917, to the date that the same was expropriated and title thereto taken by the United States of America, namely, June 28, 1918; nor for the period from the last mentioned date to the date of the award of compensation for the taking of title, namely, December 3, 1918.

13. That the use and occupation of said premises and property during the periods April 6, 1917, to June 28, 1918, and June 28, 1918, to December 3, 1918, was reasonably worth the sum of three thousand four hundred dollars ($3,400) per day, and claimant, had it not been deprived of the use, possession and control of said premises and property as herein mentioned, could have leased the same for the sum aforesaid.

14. That claimant hereby claims:

(a) For the use and occupation of its premises and property hereinbefore mentioned from April 6, 1917, to June 28, 1918, the sum of three thousand four hundred dollars ($3,400) per day, making a total of one million five hundred and twenty-three thou- [fol. 6] sand two hundred dollars ($1,523,200) for said period.

(b) For the use and occupation of the said premises and property from June 28, 1918, to December 3, 1918, the sum of three thousand four hundred dollars ($3,400) per day, making a total of five hundred and thirty-seven thousand two hundred dollars ($537,200) for said period.

(c) In the alternative, if the claim last stated shall not be allowed, claimant claims for the use and occupation of said premises and property during the period June 28, 1918, to December 3, 1918, such amount of money as will represent and be equal to legal interest for said length of time on the value of said premises and property as established by the award of compensation made therefor by the

President of the United States of America by his Proclamation issued December 3, 1918.

15. This suit is founded upon:

(a) The Constitution of the United States of America.

(b) The said Act of Congress of August 29, 1916, c. 418, Sect. 1 (39 Stat. 645).

(c) An implied contract with the Government, arising out of the facts hereinbefore stated, to make compensation for the use of said property from the date the United States of America took possession thereof until the date the United States of America took title thereto and awarded compensation for the title so taken.

(d) A claim, not sounding in tort, for unliquidated damages [fol. 7] for the reasonable value of the use and occupation of claimant's property herein described, prior to the acquisition of title thereto by the Government, and from the date of such acquisition of title until the date of the award of compensation therefor pursuant to the Act of Congress in that suit made and provided.

16. That no action has been had on this claim in Congress or by any of the Departments, nor has any request or application for action concerning the same been made; that the claimant, North German Lloyd, is the sole owner of this claim and no other person or corporation is interested therein; that no assignment or transfer of this claim or of any interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets (regard being had also to the fact that claims b and c stated in paragraph 14 hereof are made in the alternative only); that Claimant had not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that claimant (and its agent executing this amended petition in its behalf) believes the facts as stated in this amended petition to be true.

17. That neither claimant nor any assignee of claimant has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States, [fols. 8 & 9] which suit or process is based upon the facts herein stated or any of such facts, or has reference to the subject matter of this amended petition.

18. That the original petition herein was filed in the Court of Claims within six years after the claims herein set forth first accrued.

19. That this amended petition is signed by claimant's duly appointed attorney of record, and, claimant being a body corporate, is also signed and verified in its behalf by its general agent and attorney in fact in the United States thereunto duly authorized, and

claimant makes profert of its said agent's power of attorney authorizing him to act in its behalf, and makes reference to a true copy of said power of attorney which is annexed to and made part of the original petition filed herein as aforesaid.

North German Lloyd, Claimant. Heinrich Schuengel, General Agent and Attorney in Fact. Edgar W. Hunt, Attorney of Record.

Certificate to foregoing paper omitted in printing.

[fol. 10] III. Defendant's Demurrer—Filed May 26, 1923

(Note.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Edgar W. Hunt, on February 19, for the plaintiff in this case, and the demurrer was submitted.

V. Order of Court Dismissing Amended Petition, and Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition as amended. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the amended petition is dismissed.

Memorandum

The court decides it has not jurisdiction of this case, and refers for its reasons stated at length in its opinion in Deutsch-Australische Dampfschiffs-Gesellschaft Case, No. C-576, decided March 17, 1924. See act of March 28, 1918, 40 Stat., 458, and President's proclamation (40 Stat., 1804) June 28, 1918, and the order by the President in his proclamation of December 3, 1918, 40 Stat., 1914, that com-

pensation for the property mentioned in the petition be paid to the Alien Property Custodian.

[fol. 11] VI. Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and rea-onable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the al-

leged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 12] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 13] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls. 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Egineering Co. v. White & Co. 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon court's authority to condemn enemy property. Chief Justice Marshall said page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court is [fol. 14] asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war power of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls. 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than

such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 15] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought:

"Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case 10 C. Clys. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring power upon [fol. 16] this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation.

But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessel. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4 and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 17] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

GRAHAM, Judge; HAY, Judge; DOWNEY, Judge, and BOOTH, Judge, concur.

[fol. 18] VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed June 3, 1924

From the judgment rendered in the above-entitled cause on the 17th day of March, 1924, in favor of the defendant, the claimant, by its attorney, on this 3rd day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Edgar W. Hunt, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 19] [Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twentieth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,444. Court of Claims. Term No. 479. North German Lloyd, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,444.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 450

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1921

(30,445)

(30,445)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 480

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] COURT OF CLAIMS OF THE UNITED STATES

No. C 312

NORTH GERMAN LLOYD

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION

To the Honorable the Court of Claims:

The claimant, North German Lloyd, respectfully represents:

1. That it is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Free and Hanseatic City of Bremen in Germany, and of Germany, named and known in the German language as Norddeutscher Lloyd and in the English language as North German Lloyd, and is, and was at all the times hereinafter mentioned, a citizen or subject of the German Government.

2. That the German Government accords to citizens of the United States the right to prosecute claims against it in its courts.

[fol. 2] 3. That continuously from the year 1857 to about the end of the month of July, 1914, claimant maintained regular steamship services between its home port of Bremen and other foreign ports and the port of New York in the United States of America, which services were interrupted at the time last mentioned by the outbreak of war between Germany and other European powers.

4. That on April 6, 1917, claimant was the owner and in possession of certain personal property, acquired and used by it in connection with its aforesaid steamship business, and then located in, upon and about certain piers, docks, wharves (and the waters surrounding the same) situate on the Hudson River in the City of Hoboken, County of Hudson and State of New Jersey, owned by the North German Lloyd Dock Company, a corporation of the State of New Jersey, and of which claimant was then in possession as lessee; and which property was, at or during the times hereinafter stated, expropriated by the United States of America, acting by and through the War

Department and the military forces, under authority of the Act of Congress of August 29, 1916, c. 418 §1, (39 Stat. 645), in the manner hereinafter set forth, and taken out of the possession and ownership of claimant and into the possession and ownership of the United States of America.

5. That for purposes of convenience in stating this claim said personal property may be divided into six categories, described and identified as follows:

[fol. 3] The First Category.—This consists of property expropriated as a result of selections made by appraisers acting for the United States Army in April and May, 1917, and is composed of a large number of items of property of the following general character: office furniture, ships' furnishings and supplies; tools and movable equipment and appliances and cargo gear; timber, lumber, articles of iron and steel, and other materials, for repair of piers and pier equipment and ships; machine shop tools and supplies; blacksmith shop tools and supplies; electric and oil lighting supplies; carpenter shop tools and supplies; rope, cotton waste, coal and coal gear; paint shop tools and supplies; sail maker's shop tools and supplies; and miscellaneous movable property used and useful in the operations incident to maintaining said piers and loading and discharging vessel thereat. The items comprised in this category listed in an inventory, made up and signed by representatives of claimant and of the United States acting jointly.

The Second Category.—This consists of property similar in character to that comprised in the First Category, and the articles comprised herein were taken into possession by the United States of America in April and May, 1917, and have ever since been held by it, but were not expropriated until a later date, which claimant cannot fix more certainly than to say that it was not later than June 26, 1918, on which date the property comprised in this category was added by the United States of America to the inventory mentioned in describing the First Category.

[fol. 4] The Third Category.—This consists of property similar in character to that comprised in the First and Second Categories and was expropriated on May 28, June 8 and June 25, 1917, and on June 26, 1918, was added to the inventory before mentioned.

The Fourth Category.—This consists of sail maker's shop stores, paint shop stores and articles contained in baggage store room. These goods were all taken into possession by the United States of America on April 6, 1917, and detailed lists of them are contained in the inventory above mentioned, set forth under a separate heading which states that the "lists were canvassed Thursday, March 21" (no year stated), by representatives of the claimant and of the United States of America. Claimant is not informed of the date upon which the goods were expropriated by the United States of America.

The Fifth Category.—This consists in part of cargo taken from North German Lloyd vessels and in part of property similar in character to that comprised in the First, Second, Third and Fourth Categories, and was taken into possession by the United States of America in April and May, 1917, and on June 26, 1918, was added by the United States to the inventory before mentioned.

(The items comprised in the foregoing five categories are very numerous. They are set forth in full in the inventory above mentioned, duplicate originals of which, as claimant is informed and believes, are in possession of the War Department and Navy Department and also of the Alien Property Custodian, and claimant, in lieu of setting forth said inventory in full in this petition, refers to the [fol. 5] same and makes profert of a duplicate original thereof given claimant by the United States of America.)

The Sixth Category.—This consists of the following property expropriated on or shortly after April 6, 1917, and not included in the above mentioned inventory, namely: equipment for fire protection, 1 new fire pump not yet installed, 460 differential tackles for doors, 37 electric winches, tug boat "Pollux" including equipment, coal hoister "Vulkan" including equipment, coal hoister "Jupiter" including equipment, ash boat No. 1 including equipment, ash boat No. 2 including equipment, 19 floating fenders and 2 floats.

6. The value of the property expropriated as aforesaid is as follows:

First Category.—This was valued by the United States of America, as appears from the above-mentioned inventory, at the aggregate sum of $25,330.85 and was valued by claimant at the aggregate sum of $34,709.26, which last mentioned sum claimant alleges to be the true value of said property at the time of the expropriation thereof.

Second Category.—This was valued by the representatives of the United States of America and of claimant, acting jointly, at the aggregate sum of $26,303.08, subject to the following notation entered on said inventory: "Note:—Values entered against items are not conclusive; they are merely to be used as a guide for identification in connection with the locations shown." Claimant alleges, however, that said sum of $26,303.08 is the true value of said property at the time of the expropriation thereof.

[fol. 6] Third Category.—This was valued by the representatives of the United States of America and of claimant at the aggregate sum of $672, which sum claimant alleges was the true value of said property at the time of expropriation thereof.

Fourth Category.—The inventory above mentioned states the value of the goods comprised in this category at the aggregate sum of $17,579.90, which sum claimant alleges was the true value of the said property at the time of the expropriation thereof.

Fifth Category.—Claimant alleges that the true value of the property comprised in this category at the time of expropriation was the sum of $7,110. So far as claimant knows this property was not valued by the United States of America.

Sixth Category.—Claimant alleges that the true value of the several items comprised in this category at the time of expropriation thereof was as follows:

Equipment for fire protection	$2,697.50
1 new fire pump not yet installed	2,420.00
460 differential tackles for doors	18,080.00
37 electric winches	32,100.00
Tug boat "Pollux" including equipment	16,000.00
Coal hoister "Vulcan" including equipment	2,624.00
Coal hoister "Jupiter" including equipment	1,820.00
Ash boat No. 1 including equipment	515.00
Ash boat No. 2 including equipment	615.00
19 floating fenders	1,500.00
2 floats	250.00
Making a total of	$78,621.50

[fol. 7] 7. That no compensation has at any time been awarded or paid to claimant by the United States of America for or in respect of any of the property in any of the categories mentioned in this amended petition.

8. That with respect to the property comprised in the First, Second, Third, Fourth and Fifth Categories, a certain memorandum concerning the same was, on or about June 26, 1918, drawn up by the representatives of the United States of America and signed by them and a representative of claimant and attached to the inventory herein-before mentioned. The following is a true copy of said memorandum and of the signatures thereto:

"At a meeting held at the office of The New York Trust Company, at No. 26 Broad Street, New York City, on June 26, 1918, at ten A. M., at which were present Mr. Frank E. Williamson, representing the North German Lloyd; Mr. G. Friedrichs, former Chief Dock Clerk, of the North German Lloyd; Messrs. Otto T. Bannard, Morgan M. Mann and Gilbert S. McClintock, representing the Alien Property Custodian; Col. A. C. Blunt, U. S. A.; Col. F. H. Schoeffel, U. S. A., and Paymaster J. Lyman Pratt, U. S. Navy, comprising the joint Board of the War and Navy Departments, respectively, and Captain Lawson Sandford, Asst. to the General Superintendent, Army Transport Service, New York, there was submitted an inventory showing the quantities and articles of movable property, material, gear and supplies owned by the North German Lloyd, for which the Army is considered responsible, as a result of the se-
[fol. 8] lections by the Appraisers for the Army in April and May, 1917. This was marked for identification by Mr. Bannard, Col. Blunt, Paymaster Pratt and Mr. Friedrichs.

"There was added to this inventory, similarly marked for identification, a group of North German Lloyd property of similar type, which the Appraisers had not recommended in April and May, 1917, but which was retained in Army possession, and is recommended to be incorporated as a part of the inventory aforesaid.

"To complete the responsibility and record of the Army, there was also added for record certain items of office furniture which the Army subsequently acquired from the North German Lloyd, likewise similarly marked for identification.

"The three groups shall be combined, written out and shall constitute the official inventory and record of all the movable property of the North German Lloyd in the hands of and chargeable to the War Department at its Hoboken Piers on April 17, 1917, and shall be executed by the representatives of the several interests concerned. This procedure was agreed to by all present, and the question of values was not raised.

"Separate and apart from this settlement is involved the determination of responsibility for certain miscellaneous property of the North German Lloyd (mainly ex ships) reposing on April 17, 1917, in certain rooms on the upper deck of the bulkhead building. The matter is under adjustment in respect to the present location and identification of this miscellaneous property, and if it is not accounted for or turned over to Mr. Bannard, Alien Property Custodian, to his satisfaction, the Joint Army and Navy Board, hereby [fol. 9] decide to recommend to the War Department that the responsibility rests upon the War Department. To establish the record a special supplement to the main inventory determined above shall be written and executed forthwith in similar manner.

"It is agreed that the North German Lloyd and not the North German Lloyd Dock Company was the owner of all the property referred to.

(Sgd.) Otto T. Bannard, for Alien Property Custodian. A. C. Blunt, Lt. Col. U. S. A., for U. S. Army. Frank E. Williamson, Attorney for North German Lloyd."

A duplicate original of said memorandum and inventory was given to claimant and, as claimant believes, other duplicate originals were retained by the United States of America.

9. That claimant hereby claims from the United States of America, as the true and reasonable value of its property expropriated as herein stated, the sum of $164,995.74, being the aggregate of the values assigned by claimant to the property described in the foregoing six categories.

10. That this suit is founded upon:

(a) The Constitution of the United States of America.

(b) The Act of Congress of Aug. 29, 1916, c. 418, §1, (39 Stat. 645).

[fol. 10] (c) An implied contract with the Government, arising out of the facts herein stated, to make compensation for the value of claimant's property herein described, expropriated by the United States of America for its use.

(d) A claim, not sounding in tort, for unliquidated damages for the reasonable value of claimant's property, hereinbefore mentioned, expropriated by the United States of America for its use.

(e) An express contract with the Government for the payment of the reasonable value of the said property expropriated by the United States of America; said contract being evidenced by the memorandum concerning said property, signed by the representatives of the Government acting in that behalf, which is set forth in full in paragraph 8 hereof.

11. That no action has been had on this claim in Congress; that no action has been had hereon by any of the Departments, except such action as is evidenced by the memorandum concerning claimant's property which is set forth in paragraph 6 hereof; that the claimant, North German Lloyd, is the sole owner of this claim and no other person or corporation is interested therein; that no assignment or transfer of this claim, or *if* any interest therein, has been made; that claimant is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and off-sets; that claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United [fol. 11] States; and that claimant (and its agent executing this amended petition in its behalf) believes the facts as stated in this amended petition to be true.

12. That neither claimant nor any assignee of claimant has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States, which suit or process is based upon the facts herein stated or any of such facts, or has reference to the subject-matter of this amended petition.

13. That the original petition herein was filed in the Court of Claims within six years after the claims herein set forth first accrued.

14. That this amended petition is signed by claimant's duly appointed attorney of record, and, claimant being a body corporate, is also signed and verified in its behalf by its general agent and attorney in fact in the United States thereunto duly authorized, and claimant makes profert of its said agent's power of attorney authorizing him to act in its behalf, and makes reference to a true copy of said power of attorney which is annexed to and made part of the original petition filed herein as aforesaid.

North German Lloyd, Claimant. Heinrich Schuengel, General Agent and Attorney in Fact. Edgar W. Hunt, Attorney of Record.

[fol. 12] Jurat showing the foregoing was duly sworn to by Heinrich Schuengel omitted in printing.

[fol. 13] DEFENDANT'S DEMURRER—Filed May 26, 1923

(NOTE.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. ARGUMENT AND SUBMISSION OF DEMURRER

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Edgar W. Hunt, on February 19, for the plaintiff in this case, and the demurrer was submitted.

V. ORDER OF COURT DISMISSING AMENDED PETITION, AND MEMORANDUM—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition as amended. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the amended petition is dismissed.

MEMORANDUM

The court decides it is without jurisdiction to hear and determine this case. Reference is made for its reasons to the court's opinion in Deutsch-Australische Dampschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

[fol. 14] VI. Opinion of the Court Referred to in Court's Memoradum—Decided March 17, 1924

No. C-576

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 15] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United

States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, orsubject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question president at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded

upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, C. Cls. 562. In Hvoslef case, 237 [fol. 16] U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller. 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient,

but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the [fol. 17] court is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222, U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to he rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in

charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures restorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 18] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say- in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. The provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 19] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against he Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by

the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 20] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 21] VII. PLAINTIFF'S APPLICATION FOR AND ORDER ALLOWING APPEAL—Filed June 3, 1924

From the judgment rendered in the above-entitled cause on the 17th day of March, 1924, in favor of the defendant, the claimant, by its attorney, on this 3rd day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Edgar W. Hunt, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 22] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twentieth Day of June, A. D. 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,445. Court of Claims. Term No. 480. North German Lloyd, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,445.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 491

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 23, 1924

(30,448)

(30,446)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 481

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 28, 1924

[fol. 1] IN THE COURT OF CLAIMS

No. C-313

NORTH GERMAN LLOYD, Claimant,

vs.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed Apr. 5, 1923

To the Honorable the Court of Claims:

The claimant, North German Lloyd respectfully represents:

1. That it is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Free and Hanseatic City of Bremen in Germany, and of Germany, named and known in the German language as Norddeutscher Lloyd and in the English language as North German Lloyd, and is, and was at all the times hereinafter mentioned, a citizen or subject of the German Government.

2. That the German Government accords to citizens of the United States the right to prosecute claims against it in its courts.

3. That in the month of July, 1914, and for many years prior thereto, claimant was operating steamship services between its home [fol. 2] port of Bremen and other foreign ports and various ports in the United States and other parts of the world, all of which services were in the last part of July and the early part of August, 1914, discontinued by reason of the outbreak of war between Germany and other European powers.

4. That at the time of the outbreak of said war there were in various ports and harbors of the United States and of its territories and insular possessions certain merchant vessels belonging to claimant which had come to said ports and harbors in the ordinary course of trade and commerce prior to the outbreak of said war, and which, after the outbreak of said war, remained therein of necessity as ports of refuge to avoid the risk of capture by the enemy incident to their going to sea in the further prosecution of their voyages.

5. That within a few days or weeks next ensuing after the outbreak of said war there also came into various ports and harbors of the United States and of its territories and insular possessions certain other merchant vessels belonging to claimant, some of which, at the time of the outbreak of said war, were bound to such ports in the ordinary course of commercial voyages, and others of which, being bound on commerical voyages to ports not of the United States, departed from the regular course of their voyages and ran to various ports and harbors of the United States and its territories and insular

possessions to avoid capture, and all of which, having reached ports [fol. 3] or harbors of the United States or of its territories or insular possessions, remained and took refuge therein to avoid the risk of capture by the enemy incident to their again going to sea.

6. That on April 6, 1917, all the merchant vessels belonging to claimant mentioned in the two paragraphs next preceding (and which are hereinafter identified by their names) still remained in various ports and harbors of the United States and of its territories and insular possessions, using the same as ports of refuge, and on said day last mentioned a Joint Resolution was adopted by Congress and approved by the President formally declaring the existence of a state of war between the United States and Germany; and on the same day all of claimant's above mentioned merchant vessels were entered upon and taken possession of by the United States of America, acting by and through its officers and agents.

7. That on May 12, 1917, a Joint Resolution was adopted by Congress and approved by the President, the title and body of which are in the words following, to wit:

"Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

Resolved, &c.

[fol. 4] "Sec. 1. That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

8. That on various dates within a period of not more than one year subsequent to May 12, 1917, there was taken over, or purported to be taken over, to the United States by virtue of executive orders made by the President under the authority of the Joint Resolution set forth [fol. 5] in the preceding paragraph, the title to all of claimant's above-mentioned merchant vessels.

9. That in the following statement claimant states, so far as lies within its knowledge, the various executive orders under which title to its said vessels was taken, or purported to be taken, by the United States, and the Government agencies which acted in behalf of the United States in taking over said vessels, and also sets forth the names of its said vessels, their type and tonnage, and their respective values as of April 6, 1917, the day when they were first taken into possession by the United States, and as of the dates of the taking of title to its vessels respectively by the United States.

Vessels Taken Over to the United States Through the United States Shipping Board under Executive Order of June 30, 1917

A. Passenger Steamers

Name	Tonnage	Value
Kaiser Wilhelm II ..	19,361 gross register tons....	$12,500,000.00
Kronprinzessin Cecile	19,503 " " "	14,000,000.00

B. Combined Passenger and Freight Steamers

Name	Tonnage	Value
Barbarossa	10,984 gross register tons....	$3,295,200.00
Borneo	2,168 " " "	542,000.00
Coblenz	3,130 " " "	516,450.00
Friedrich d. Grosse..	10,771 " " "	3,231,300.00
George Washington.	25,570 " " "	12,785,000.00
Grosser Kurfuerat...	13,102 " " "	4,258,150.00
Koeln	7,409 " " "	1,222,500.00
Neckar	9,835 " " "	2,704,625.00
Prinzess Alice	10,981 " " "	3,843,350.00
Prinzess Irene	10,893 " " "	3,812,550.00
Rhein	10,058 " " "	2,765,950.00
Willehad	4,761 " " "	785,565.00
Wittekind	5,640 " " "	030,600.00
Darvel	1,508 " " "	377,000.00
Marudu	1,514 " " "	378,500.00
Prinz Waldemar ...	3,227 " " "	839,020.00

[fol. 6]

C. Freight Steamers

Name	Tonnage	Value
Elsass	11,220 dead weight tons	$2,805,000.00
Mark	11,496 " " "	2,874,000.00
Pommern	12,674 " " "	3,168,500.00
Rajah	3,250 " " "	487,500.00
Tsingtau	2,500 " " "	275,000.00
Tuebingen	6,775 " " "	846,875.00
Pongtong	2,000 " " "	350,000.00

Vessels Taken Over to the United States Through the United States Navy under Executive Order of May 22, 1917

A. Passenger Steamers

Name	Tonnage	Value
Kronzprinz Wilhelm	14,908 gross register tons	$8,000,000.00

B. Combined Passenger and Freight Steamers

Name	Tonnage	Value
Prinz Eitel Friedrich	8,797 gross register tons	$3,298,875.00

C. Freight Steamers

Name	Tonnage	Value
Locksun	2,000 dead weight tons	$350,000.00

Vessels Taken Over to the United States But by What Department of the Government or under What Executive Order Claimant Is not Informed

A. Combined Passenger and Freight Steamers

Name	Tonnage	Value
Breslau	7,524 gross register tons	$1,316,700.00

10. That no compensation has at any time been paid or awarded for the value of said vessels, title to which was taken over by the United States as aforesaid.

11. That claimant hereby claims from the United States of America: The sum of Ninety-two million five hundred and sixty [fol. 7] thousand two hundred and ten dollars ($92,560,210), being the aggregate reasonable value of its aforesaid ships, both as of April 6, 1917, and as of the dates when the title to the said ships respectively was taken over to the United States.

12. This suit is founded upon:

(a) The Constitution of the United States of America.

(b) The Joint Resolution of Congress, adopted May 12, 1917, and hereinbefore set forth, which conecmplates that compensation shall be paid for vessels taken over to the United States by virtue of its provisions.

(c) An implied contract with the Government, arising out of the facts hereinbefore stated, that compensation shall be paid for the value of claimant's vessels expropriated by the United States as herein set forth, as of the date when title thereto was taken over by the United States.

(d) A claim, not sounding in tort, for unliquidated damages for the reasonable value of claimant's said vessels as of the date when the United States took over title thereto.

13. That no action has been had on this claim in Congress (except as the Joint Resolution of May 12, 1917, hereinbefore set forth constitutes action) or by any of the Departments, nor has any request or application for action concerning the same been made; that the claimant, North German Lloyd, is the sole owner of this claim and [fol. 8] no other person or corporation is interested therein; that no assignment or transfer of this claim or of any interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets; that claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that claimant and its agent executing this petition in its behalf) believes the facts as stated in this petition to be true.

14. That neither claimant nor any assignees of claimant has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States, which suit or process is based upon the facts herein stated or any of such facts, or has reference to the subject matter of this petition.

15. That this petition is filed in the Court of Claims within six years after the claims herein set forth first accrued.

16. That this petition is signed by claimant's duly appointed attorney of record, and, claimant being a body corporate, is also signed and verified in its behalf by its general agent and attorney in fact in the United States thereunto duly authorized, and claimant makes profert of its agent's power of attorney authorizing him to act in its behalf, and annexed hereto and makes part hereof a [fols. 9 & 10] true copy of said power of attorney.

North German Lloyd, Claimant, by H. Schüngel, General Agent and Attorney in Fact. Edgar W. Hunt, Attorney of Record.

Jurat showing the foregoing was duly sworn to by H. Schüngel omitted in printing.

[fol. 11] II. Defendant's Demurrer—Filed May 26, 1923

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

III. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Edgar W. Hunt, on February 19, for the plaintiff in this case, and the demurrer was submitted.

IV. Order of Court Dismissing Petition, and Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof, the court being of opinion that the demurrer is well taken doth adjudge and order this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the petition is dismissed.

Memorandum

The petition claims an amount as the reasonable value of certain passenger and freight steamers belonging to plaintiff and "taken over" by the Government of the United States. The court concludes that it has not jurisdiction for the reasons stated in its opinion in Deutsch-Australische Dampfschiffs-Gesellschaft Case, No. C-576, decided March 17, 1924.

[fol. 12] V. Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

No. C-576

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and rea-onable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 13] On April 6, 1917, the Congress adopted the joint resolu-

tion declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that

the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 14] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The

court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court is asked [fol. 15] to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304 that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial deal-

ings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 16] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarily situated has ever been permitted to sue the United

States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If th record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring power [fol. 17] upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Nothwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy

act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572). The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 18] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 19] VI. PLAINTIFF'S APPLICATION FOR AND ORDER ALLOWING APPEAL—Filed June 3, 1924

From the judgment rendered in the above-entitled cause on the 17th day of March, 1924, in favor of the defendant, the claimant, by its attorney, on this 3rd day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Edgar W. Hunt, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

June 17, 1924.

[fol. 20] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing plaintiff's petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twentieth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,446. Court of Claims. Term No. 481. North German Lloyd, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,446.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 488 476 10

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 27, 1924

(30,453)

(30,453)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 488

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. C 309

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT
(Also Known as HAMBURG AMERICAN LINE)

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION

To the Honorable the Court of Claims:

The claimant, Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg American Line) respectfully represents:

1. That it is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Free and Hanseatic City of Hamburg, Germany, and of the Empire of Germany, commonly known in the German language as the Hamburg-Amerika Linie, and in the English language as the Hamburg American Line, and is, and was at all the times hereinafter mentioned, a citizen or subject of the German Government.

[fol. 2] 2. That the German Government accords to citizens of the United States the right to prosecute claims against it in its courts.

3. That in the month of July, 1914, and for many years prior thereto, claimant maintained and operated regular steamship services under the German flag for the transportation of passengers and freight between its home port of Hamburg and other foreign ports and various ports in the United States and other parts of the world, all of which services were in the last part of July and early part of August, 1914, discontinued by reason of the outbreak of war between Germany and other European powers.

4. That on April 6, 1917, and at all times thereafter until the said personal property was expropriated by the United States as hereinafter set forth, claimant was the owner and in possession of certain personal property acquired and used by it in connection with its aforesaid steamship services and business, which property was then

located in, upon and about certain piers, docks and wharves (and the waters surrounding the same) and the premises immediately adjacent thereto situate on the Hudson River (also known as the North River) in the City of Hoboken, County of Hudson, State of New Jersey (said piers, docks and wharves being owned by the Hamburg American Line Terminal & Navigation Company, a New Jersey corporation), and at other points in the port or harbor of New York, to wit, at the foot of West 135th Street and the Hudson River, Borough of [fol. 3] Manhattan, City of New York, at the foot of West 26th Street and the Hudson River in said Borough and City, and at the foot of 33rd Street, in the Borough of Brooklyn, City of New York; and which property was at various dates between April 17, 1917, and June 24, 1918 (which dates claimant is unable to set forth with more particularly) expropriated by the United States of America acting by and through the War Department and the military forces, under the authority of the Act of Congress of August 29, 1916, chap. 418, § 1 (39 Stat. 645), and which property was upon said dates taken out of the possession and ownership of the claimant and into the possession and ownership of the United States of America.

5. That the items comprising said personal property are set forth in full in an inventory prepared in March, 1918, by officers of the Army on behalf of the United States of America and entitled "Final Complete Inventory. Material, Supplies, Gear and Equipment (not permanent) taken over in April, 1917, by Depot Q. M., New York, for the purpose of the Army Transport Service," duplicate originals of which inventory, as claimant is informed and believes, are in the possession of the War Department and the Navy Department, and also of the Alien Property Custodian, and claimant in lieu of setting forth said inventory in full in this petition makes reference to said duplicate originals in the possession of the United States.

6. That the claim made herein is for the value of all of the prop- [fol. 4] erty set forth in said inventory with the exception of the items contained in a schedule appearing on page 18 of said inventory, under the following headings:

Electric lighting system.
Boiler & engine room.
Engineering department blacksmith shop.
Floating craft.
H. A. L. No. 2 (tug boat).
H. A. L. No. 3 (tug boat).
H. A. L. No. 4 (launch).
Coal hoister.

7. That the property expropriated by the United States as aforesaid includes a large number of items of the following general character: office furniture, ships' furnishings and supplies; tools and movable equipment and appliances and cargo gear; timber, lumber, articles of iron and steel and other materials for repair of piers and pier equipment and ships; machine shop tools and supplies; black-

smith shop tools and supplies; electric and oil lighting supplies; carpenter shop tools and supplies; rope, cotton waste, coal and coal gear; paint shop tools and supplies; sail marker's shop tools and supplies; apparatus for handling baggage; equipment for fire prevention; and miscellaneous movable property used and useful in the operations incident to maintaining said piers and loading and discharging vessels thereat.

That the reasonable aggregate value of said personal property at the time when the same was expropriated by the United States was [fol. 5] one hundred thirty-nine thousand four hundred four and 90/100 dollars ($139,404.90).

8. That with respect to the property comprised in the inventory hereinabove referred to a certain memorandum or minute concerning the same was, on or about June 24, 1918, drawn up by the representatives of the United States and signed by them and by a representative of claimant and attached to the said inventory. The following is a true copy of said memorandum and of the signatures thereto:

"At a meeting held at the Office of the New York Trust Company, at No. 26 Broad Street, New York City, on June 24th at 3.30 p. m. at which were present: Messrs. W. G. Sickel, Julius P. Meyer and Capt. F. Jarka, representing the Hamburg-American Line; Messrs. Otto T. Bannard, Morgan M. Mann and Gilbert S. McClintock representing the Alien Property Custodian; and Col. A. C. Blunt, Col. F. H. Schoeffel and Paymaster J. Lyman Pratt representing the joint Board of the War and Navy Departments, respectively, and Capt. Lawson Sandford also representing the War Department, there was submitted an inventory, with explanatory notes, consisting of nineteen pages, showing the movable property including several items on pages eighteen and nineteen, namely: H. A. L. No. 2 Tug Boat, H. A. L. No. 3 Tug Boat, H. A. L. No. 4 Launch, a coal Hoister and three scows belonging to the Hamburg-American Line that had been taken over by the War Department since April 17, 1917, and for which the War Department is responsible.

"This inventory was marked for identification by the signatures [fol. 6] of Messrs. Sickel and Meyer of the Hamburg-American Line, Otto T. Bannard for the Alien Property Custodian and Col. Blunt for the Joint Board.

"Capt Sandford stated that the question as to whether the property was enemy property had been discussed and that the representatives of the Hamburg-American Line had stated that while the original inventory was as of the Hamburg-American Line Terminal and Navigation Co., the property was actually purchased and acquired by the Hamburg-American Line and, therefore, is alien enemy property.

"At the conclusion of the meeting it was agreed that if the Advisory Board subsequently reports favorably to that effect and such report is approved by the War Department, this inventory would be accepted as a list of all the movable property of the Hamburg-Amer-

ican Line in the hands of and chargeable to the War Department at its Hoboken Piers since April 17th, 1917.

(Signed) Otto T. Bannard, for Alien Property Custodian, A. C. Blunt, Lt. Col., U. S. A. W. G. Sickel, for Hamburg-American Line. O. T. B.

"NOTE.—While the minute provides that the execution of the official documents of record shall be contingent upon the approval, by the Departments concerned, of the recommendations of the Joint Army and Navy Board, it is now mutually agreed that the execution be accomplished forthwith, if only because of the difficulty of securing the presence of the numerous individuals involved.

"This proceeding in no way alters the status of the parties to the [fol. 7] agreement, but serves only to expedite the prompt settlement of the matters involved.

(Signed) J. Lyman Pratt, (title illegible.)"

9. That claimant hereby claims from the United States of America, as the true and reasonable aggregate value of its property expropriated as herein stated, the sum of $139,404.90.

10. That this suit is founded upon:

(a) The Constitution of the United States of America.

(b) The Act of Congress of August 29, 1916, chap. 418, §1, (39 Stat. 645).

(c) An implied contract with the Government, arising out of the acts herein stated, to make compensation for the value of claimant's property herein described, expropriated by the United States of America for its use.

(d) A claim, not sounding in tort, for unliquidated damages for the reasonable value of claimant's property, hereinbefore mentioned, expropriated by the United States of America for its use.

(e) An express contract with the Government for the payment of the reasonable value of the said property expropriated by the United States of America; said contract being evidenced by the memorandum concerning said property, signed by the representatives of the Government acting in that behalf, which is set forth in full in paragraph 8 hereof.

11. That no compensation has at any time been awarded or paid [fol. 8] to claimant by the United States of America for or in respect of any of the property mentioned in this amended petition.

12. That no action has been had on this claim in Congress; that no action has been had hereon by any of the Departments, except such action as is evidenced by the memorandum concerning claimant's property which is set forth in paragraph 8 hereof; that the claimant, Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft (also known as Hamburg-American Line), is the sole owner of this

claim and no other person or corporation is interested therein; that no assignment or transfer of this claim, or of any interest therein, has been made; that claimant is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets; that claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that claimant (and its agents executing this amended petition in its behalf) believes the facts as stated in this amended petitioner to be true.

13. That neither claimant nor any assignee of claimant has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States, which suit or process is based upon the facts herein stated or any of such facts, or has reference to the subject matter of this amended petition.

fols. 9 & 10] 14. That the original petition herein was filed in the Court of Claims within six years after the claims herein set forth first accrued.

15. That this amended petition is signed by claimant's duly appointed attorney of record, and, claimant being a body corporate, is also signed and verified in its behalf by its attorneys in fact in the United States thereunto duly authorized, as appears from a duly exemplified copy of said power of attorney attached to the original petition filed as aforesaid.

Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft. Julius P. Meyer, Alfred Engelke, Attorneys in Fact. Carl L. Schurz, Attorney of Record.

Jurat showing the foregoing was duly sworn to by Julius P. Meyer et al. omitted in printing.

[fol. 11] III. Defendant's Demurrer—Filed May 26, 1923.

Note.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J.

Galloway, for the defendants, and, on February 20, by Mr. Edgar W. Hunt, for plaintiff in this case, and the demurrer was submitted.

V. Order of Court Dismissing Amended Petition—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the said demurrer is well taken doth adjudge and order this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the amended petition is dismissed.

See opinion in Deutsch-Australische Dampschiffs Gesellschaft' Case, No. C-576, March 17, 1924.

[fol. 12] VI. Opinion of the Court Referred to in Court's Order Dismissing Petition—Decided March 17, 1924.

No. C-576

Deutsch-Australische Dampfschiffs-Gesellschaft

vs.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and rea-onable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possessions and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to

pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 13] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department.

These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 14] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution

was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the [fol. 15] court is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments" (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner

in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 16] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds

of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power cannot be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 17] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against

the United States for compensation." He mentions 25 different instances. The Government cannot be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign cannot be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was [fol, 18] no intention to authorize suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice.

The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 19] VII. Substitution of Attorney

On June 4, 1924, William B. Devoe, Esq., filed a motion suggesting the death of Carl L. Schurz, former attorney of record in this case, and asked leave of court to be substituted as attorney of record. On June 7, 1924, the court allowed the motion, and the said William B. Devoe was substituted as attorney of record.

VIII. Plaintiff's Application for and Order Allowing Appeal—Filed June 10, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, the claimant, by its attorney, on June 10, 1924, makes application for and gives notice of, an appeal to the Supreme Court of the United States.

William B. Devoe, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

June 16, 1924.

[fol. 20] Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition; of the opinion of the court referred to in court's order; of the sub-

stitution of attorney of record; of the plaintiff's application for a appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affix the seal of said court at Washington City this Nineteenth day o June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Se of the Court of Claims.)

Endorsed on cover: File No. 30,453. Court of Claims. Term No. 488. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (als known as Hamburg American Line), appellant, vs. The United States. Filed June 27th, 1924. File No. 30,453.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 486

HAMBURG-AMERIKANISCHE PACKETFAHRT ATKIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 21, 1914

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 489

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] **IN THE COURT OF CLAIMS**

No. C-310

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN GESELLSCHAFT (Also Known as HAMBURG-AMERICAN LINE), Claimant,

vs.

THE UNITED STATES OF AMERICA, Defendant.

I. PETITION—Filed Apr. 5, 1923

To the Honorable the Court of Claims:

The claimant, Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg American Line) respectfully represents:

1. That it is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Free and Hanseatic City of Hamburg, Germany, and of the Empire of Germany, commonly known in the German language as the Hamburg-Amerika Linie, and in the English language as the Hamburg American Line, and is, and was at all times hereinafter mentioned, a citizen or subject of the German Government.

[fol. 2] 2. That the German Government accords to citizens of the United States the right to prosecute claims against it in its courts.

3. That in the month of July, 1914, and for many years prior thereto, claimant was operating regular steamship services under the German flag for the transportation of passengers and freight between its home port of Hamburg and other foreign ports and various ports in the United States and other parts of the world, all of which services were in the last part of July and the early part of August, 1914, discontinued by reason of the outbreak of war between Germany and other European powers.

4. That at the time of the outbreak of said war there were in various ports and harbors of the United States and of its territories and insular possessions certain merchant vessels belonging to claimant which had come to said ports and harbors while engaged in the aforesaid services and in the ordinary course of trade and commerce prior to the outbreak of said war, and which, after the outbreak of said war, were compelled to remain in said ports as ports of refuge to avoid the risk of capture by the enemy incident to their going to sea in the further prosecution of their voyages.

5. That within a few days or weeks next ensuing after the outbreak of said war there also came into various ports and harbors of the United States and of its territories and insular possessions

certain other merchant vessels belonging to claimant, some of which, [fol. 3] at the time of the outbreak of said war, were bound to such ports in the ordinary course of commercial voyages, and others of which, being bound on commercial voyages to ports not of the United States, departed from the regular course of their voyages and ran into various ports and harbors of the United States and of its territories and insular possessions to avoid capture, and all of which, having reached ports or harbors of the United States or of its territories or insular possessions, remained and took refuge therein to avoid the risk of capture by the enemy incident to their again going to sea.

6. That on April 6, 1917, all the merchant vessels belonging to claimant referred to in the two paragraphs next preceding (and which are hereinafter identified by their names) still remained in various ports and harbors of the United States and of its territories and insular possessions, using the same as ports of refuge, and on said day last mentioned a Joint Resolution was adopted by the Congress of the United States and approved by the President formally declaring the existence of a state of war between the United States and Germany; and on or about the same day all of claimant's merchant vessels above referred to were entered upon and taken possession of by the United States of America, acting by and through its officers and agents.

7. That on May 12, 1917, a Joint Resolution was adopted by Congress and approved by the President, the title and body of which are in the words following, to wit:

[fol. 4] "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessels in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy, be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings, to the Secretary of the Navy, who [fol. 5] shall preserve such report with the records of the department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

8. That on various dates within a period of not more than one year subsequent to May 12, 1917, there was taken over, or purported to be taken over, to the United States by virtue of executive orders made by the President under the authority of the Joint Resolution set forth in the preceding paragraph, the title to all of claimant's merchant vessels above referred to.

9. In the following schedule claimant states, so far as lies within its knowledge, the various executive orders under which title to its said vessels was taken, or purported to be taken, by the United States and the Government agencies which acted in behalf of the United States in taking over said vessels, and also sets forth the names of its said vessels, their type and tonnage, and their respective values as of April 6, 1917, the day when they were first taken into possession by the United States, and as of the date of the taking of title of said vessels respectively.

Vessels Taken Over to the United States Through the United States Shipping Board under Executive Order of May 14, 1917

Name	Type	Tonnage	Value
Odenwald	Freighter	5,270 Dwt.	$974,950
President	Combined Frt. & Pass.	1,849 Gr. Reg.	684,130

[fol. 6] Vessels Taken Over to the United States Through the United States Shipping Board under Executive Order of May 22, 1917

Name	Type	Tonnage	Value
Nicaria	Freighter	6,040 Dwt.	$875,800

Vessels Taken Over to the United States Through the United States Shipping Board under Executive Order of June 30, 1917

Name	Type	Tonnage		Value
Bohemia	Freighter	12,190	Dwt.	$2,072,300
Holsatia	"	9,155	"	2,014,100
Sachsen	"	12,320	"	2,464,000
Sachsenwald	"	5,380	"	968,400
Sambia	"	7,690	"	845,900
Suevia	"	6,160	"	677,600
Amerika	Frt. & Pass.	22,622	Gr. Reg.	10,179,900
Andalusia	" " "	5,432	" "	814,800
Bulgaria	" " "	11,493	" "	1,953,810
Cincinnati	" " "	16,339	" "	7,270,855
Gouverneur Jaeschke	" " "	1,738	" "	538,780
Grunewald	" " "	4,707	" "	1,694,520
Hamburg	" " "	10,531	" "	3,264,610
Koenig Wilhelm II	" " "	9,410	" "	3,905,150
Loongmoon	" " "	1,971	" "	433,620
Lyeemoon	" " "	1,925	" "	336,875
Pennsylvania	" " "	13,333	" "	2,333,275
Pisa	" " "	4,965	" "	794,400
President Grant	" " "	18,072	" "	6,054,120
President Lincoln	" " "	18,168	" "	6,086,280
Prinz Joachim	" " "	4,760	" "	1,213,800
Prinz Oskar	" " "	6,026	" "	1,536,630
Prinz Sigismund	" " "	4,689	" "	1,219,140
Rhaetia	" " "	6,600	" "	1,584,000
Staatssekretaer Kraetke	" " "	2,009	" "	733,285
Vaterland	Passenger	54,282	" "	33,926,250

Vessels Taken Over to the United States Through the United States Shipping Board under Executive Order of July 3, 1917

Name	Type	Tonnage		Value
Prinz Eitel Friedrich	Frt. & Pass.	4,650	Gr. Reg.	$1,162,500

10. That no compensation has at any time been paid or awarded [fol. 7] for the value of said vessels, title to which was taken over by the United States as aforesaid.

11. That claimant hereby claims from the United States of America the sum of Ninety-eight million, six hundred thirteen thousand seven hundred eighty dollars ($98,613,780), being the aggregate value of its aforesaid ships as of April 6, 1917, and as of the dates when the United States took title thereto.

12. This suit is founded upon:

(a) The Constitution of the United States of America.

(b) The Joint Resolution of Congress, adopted May 12, 1917, and hereinbefore set forth, which contemplates that compensation shall be paid for vessels taken over to the United States by virtue of its provisions.

(c) An implied contract with the Government, arising out of the facts hereinbefore stated, that compensation shall be paid for the value of claimant's vessels expropriated by the United States as herein set forth, as of the date when the United States took title thereto.

(d) A claim, not sounding in tort, for unliquidated damages for the reasonable value of claimant's said vessels as of the date when the United States took title thereto.

13. That no action has been had on this claim in Congress (except as the Joint Resolution of May 12, 1917, hereinbefore set forth constitutes action) or by any of the Departments, nor has any request or application for action concerning the same been made; that [fol. 8] the said claimant, Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg American Line) is the sole owner of this claim and no other person or corporation is interested therein; that no assignment or transfer of this claim or of any interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States of America after allowing all just credit and offsets; that claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that claimant (and its agents executing this petition in its behalf) believes the facts as stated in this petition to be true.

14. That neither claimant nor any assignee of claimant has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States, which suit or process is based upon the facts herein stated or any of such facts, or has reference to the subject matter of this petition.

15. That this petition is filed in the Court of Claims within six years after the claims herein set forth first accrued.

16. That this petition is signed by claimant's duly appointed attorney of record, and, claimant being a body corporate, is also signed and verified in its behalf by its attorneys in fact in the United States thereunto duly authorized, as appears from a duly exemplified copy [fols. 9 & 10] of said power of attorney hereunto attached.

Hamburg Amerikanische Packetfahrt Aktien-Gesellschaft, Claimant, by Julius P. Myer, Alfred Engelke, Attorneys in Fact. Carl L. Schurz, Attorney of Record.

Jurat showing the foregoing was duly sworn to by Julius P. Meyer, et al. omitted in printing.

[fol. 11] II. Defendant's Demurrer—Filed May 26, 1923

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

III. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases were argued by Messrs. W. F. Morris and Herman J. Galloway, for the defendant, and on February 20, by Mr. Edgar W. Hunt, for the plaintiff in this case, and the demurrer was submitted.

IV. Order of Court Dismissing Petition, With Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof, the court being of opinion that the demurrer is well taken doth Adjudge and Order this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the petition is dismissed.

Memorandum

The petition claims an amount as the reasonable value of certain passenger and freight steamers belonging to plaintiff and "taken over" by the Government of the United States. The Court concludes that it has not jurisdiction for the reasons stated in its opinion in Deutsch-Australische Dampfschiffs-Gesellschaft Case, No. C-576, decided March 17, 1924.

[fol. 12] V. Opinion of the Court Referred to in Court's Memorandum—Decided March 17, 1924

No. C-576

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organ-

ized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 13] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the

immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 14] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they

were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court is [fol. 15] asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of juris-

diction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerant right. See Morrisadle Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Greene's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 6th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntary leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the

Constitution that private property should not be taken for public [fol. 16] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been take or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Tijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be

made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 17] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdiction for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owers of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisi-

tion" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2. pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 18] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 19] VI. Substitution of Attorney

On June 4, 1924, William B. Devoe, Esq., filed a motion suggesting the death of Carl L. Schurz, former attorney of record in this case, and asked leave of court to be substituted as attorney of record. On June 7, 1924, the court allowed the motion, and the said William B. Devoe was substituted as attorney of record.

VII. Plaintiff's Application for and Order Allowing Appeal—Filed June 10, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, the claimant, by its attorney, on June 10, 1924, makes application for and gives notice of, an appeal to the Supreme Court of the United States.

William B. Devoe, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

June 16, 1924.

[fol. 20] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the substitution of attorney of record; of the plaintiff's application for an appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Nineteenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,454. Court of Claims. Term No. 489. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg American Line), appellant, vs. The United States. Filed June 27th, 1924. File No. 30,454.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

12

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JULY 5, 1894

(30,476)

(30,476)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 511

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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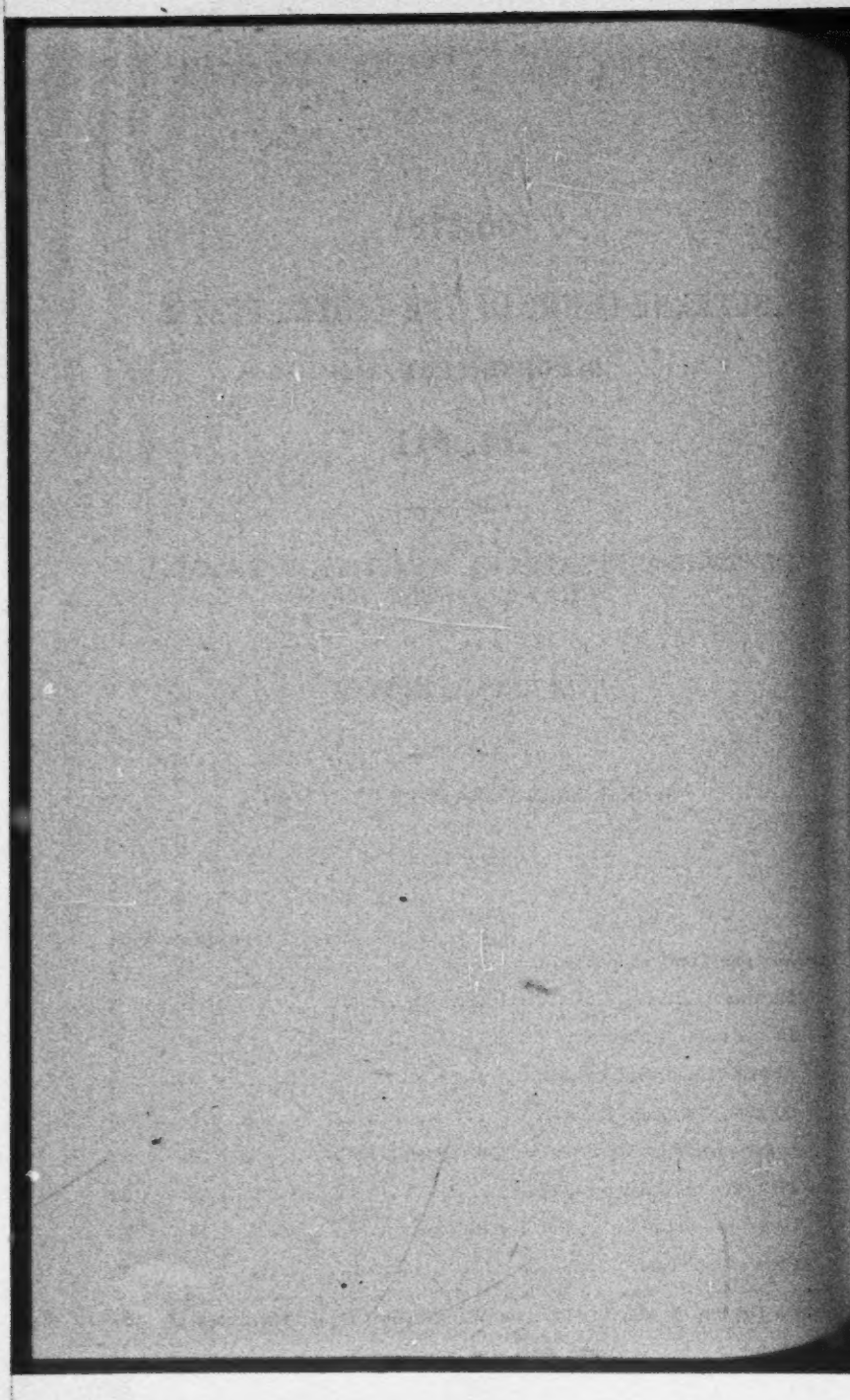

[fol. 1]

COURT OF CLAIMS

No. C576

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, Claimant,

against

THE UNITED STATES, Defendant

I. PETITION—Filed May 11, 1923

To the honorable justices of said court:

The claimant, Deutsch-Australische Dampschiffs-Gesellschaft, appearing herein by Katz & Sommerich, as its attorneys, respectively shows the following:

1. That at all the times hereinafter mentioned the claimant was and now is a corporation organized and existing under and by virtue of the laws of Germany and engaged in the business of operating steamships between Germany and certain other foreign countries for the transportation of freight for hire, owning numerous steamships, and having its principal office and place of business at Hamburg, Germany.

2. That on or about the 12th day of May, 1917, the Senate and House of Representatives of the United States of America in Congress assembled duly passed and adopted a Joint Resolution authorizing [fol. 2] the President of the United States to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under registry of any such nation, and for other purposes, the same having been approved by the President of the United States on May 12, 1917. The said Joint Resolution is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President be and he is hereby authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter,

and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a [fol. 3] written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

3. That in or about the month of May and June, 1917, pursuant to authority granted unto him by the said Joint Resolution, Hon. Woodrow Wilson, President of the United States, as such President, took over to the United States the immediate possession and control of the following named steamers which then were within the jurisdiction of the United States or its insular possessions, and which were the sole and exclusive property of claimant and in its possession, enjoyment and use, and which then were of the fair and reasonable value set opposite their respective names, to wit as follows:

Name of steamer	Fair and reasonable value of steamer at time of taking
"Elmshorn"	$1,420,000
"Bochum"	1,672,000
"Esslingen"	1,672,000
"Kiel"	1,424,000
"Magdeburg"	1,424,000
"Harburg"	1,410,000
	$9,022,000

4. That by such taking the President of the United States did deprive the claimant of the use, enjoyment and benefit of such steamers, and the fair and reasonable value of such use, enjoyment and benefit of which the claimant was thus deprived was at the rate of Ten dollars ($10) per dead-weight ton per month, to be computed from the date of the taking of such steamers down to the date of making payment thereof. That the dead-weight tonnage of said steamers is set opposite their names, respectively, to wit:

Name of steamer	Dead-weight tonnage
[fol. 4] "Elmshorn"	8,070
"Bochum"	10,195
"Esslingen"	8,250
"Kiel"	7,180
"Magdeburg"	7,200
"Harburg"	7,220

5. That in addition to taking the said steamers, as aforesaid, the President of the United States took over to the United States, the immediate possession and control of stores of bunker coal, the number of tons taken from the said steamers being set opposite their respective names, as follows:

Name of steamer	Number of tons
"Elmshorn"	350
"Bochum"	148
"Esslingen"	275
"Kiel"	50
"Magdeburg"	170
"Harburg"	60

That in addition to such stores of bunker coal, the President of the United States, at the time of the taking over of the said steamers as aforesaid took over to the United States the immediate possession and control of the equipment, appurtenances and other property contained therein at the time of their taking.

6. That by taking over the immediate possession and control of the said steamers in the manner aforesaid, and thus appropriating the said steamers to its own use, enjoyment and benefit and thereby depriving the claimant of the use, enjoyment and benefit thereof, the United States impliedly agreed with claimant to pay to claimant the fair and reasonable value of said steamers, as well as compensation for the deprivation of the use, enjoyment and benefit thereof, [fol. 5] and for bunker coal, equipment, appurtenances and other property contained therein at the time of their taking, but has wholly failed and refused and still does fail and refuse to pay the same to claimant, although demand for the payment thereof has been duly made by the claimant.

7. That by reason of the circumstances aforesaid, there is now due and owing by the United States to the claimant the sum of $9,022,000, and in addition thereto an amount equal to Ten Dollars($10) per dead-weight ton per month for each of the said steamers from the date of taking of the same down to the date of the making of the payment thereof, and an amount equal to the fair and reasonable value of the bunker coal, equipment, appurtenances and other property contained in the vessels at the time of their taking.

8. That by virtue of the provisions of the said Joint Resolution, the Secretary of the Navy was required to appoint, subject to the approval of the President of the United States, a board of survey to ascertain the actual value of the said steamers, their equipment, appurtenances and all property contained therein at the time of their taking, and to make a written report of their findings to the Secretary of the Navy, the same to be preserved by him.

On information and belief, that pursuant to the said Joint Resolution the Secretary of the Navy did cause such a board of survey to be appointed for such purpose, and such board of survey did

appraise the value of the said steamers, their respective equipment, appurtenances and all property contained therein at the time of taking of such steamers, and did file its report with the Secretary of the Navy.

[fol. 6] 9. That no action has been had on this claim in Congress or by any of the departments except as hereinabove stated. The claimant is the sole owner of this claim, and the only person interested therein. No assignment or transfer of this claim or of any part thereof or interest therein has been made. The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets.

10. That the claimant herein has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States of America.

11. That the claimant is a citizen of Germany, the government of which accords to citizens of the United States the right to prosecute Claims against such government, in its courts, and therefore, by virtue of the provisions of Section 1146 of the United States Compiled Statutes (Judicial Code, Section 155), the claimant herein has the privilege of prosecuting this claim against the United States in this Court.

12. That the claimant believes the facts as stated in this petition to be true.

Wherefore claimant demands judgment against the United States for the sum of $9,022,000, and in addition thereto an amount equal to Ten Dollars ($10) per dead-weight ton per month for each of the said steamers from the date of taking of the same down to the date of the making of the payment thereof, and an amount equal to the fair and reasonable value of the bunker coal, equipment, appurtenances and other property contained in the said vessels at the time of their taking, with any interest due thereon.

Katz & Sommerich, Attorneys for Claimant.

Office & P. O. Address 120 Broadway, City of New York, State of New York.

[fol. 7] Jurat showing the foregoing was duly sworn to by Otto C. Sommerich omitted in printing.

[fol. 8] II. DEFENDANT'S DEMURRER.—Filed May 26, 1924

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

III. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and other cases were argued by Mr. William F. Norris and Herman J. Galloway, for the defendant, and on February 18, 1924, by Mr. E. M. Borchard, for the plaintiff in this case, and the demurrer was submitted.

[fol. 9] Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

IV. Opinion of the Court.—Entered Mch. 17, 1924

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and conrtol" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these

harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 10] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtennaces, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be neces

sary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, 237 U. S. [fol. 11] 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could

admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legis- [fol. 12] lative authority so to do. In the instant case the court is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not

engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 13] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie

has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring power [fol. 14] upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in

an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorising the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to [fol. 15] authorize suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 16] V. Order of Court Sustaining Defendant's Demurrer and Dismissing Petition—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition. Upon consideration whereof, the court being of opinion that the said demurrer is well taken doth adjudge and order this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the petition is dismissed.

See opinion in this cause this date.

VI. Plaintiff's Application for and Order Allowing Appeal—Filed June 16, 1924

Now comes the claimant in the above-entitled cause and moves the court for the allowance of an appeal from the judgment of this court entered herein on the 17th day of March, 1924, to the Supreme Court of the United States.

Katz & Sommerich, Attorneys for Claimant

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

[fol. 17] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the opinion of the court by Campbell, Ch. J.; of the order of court sustaining the defendant's demurrer and dismissing the plaintiff's petition; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-third day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,476. Court of Claims. Term No. 511. Deutsch-Australische Damfschiffs-Gesellschaft, appellant, vs. The United States. Filed July 5th, 1924. Filed No. 30,476.

IN THE

Supreme Court of the United States

October Term, 1927

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No. 1. Rhederei M. Jebsen Company, Appellant, v. The United States.

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No. 11. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg-American Line), Appellant, v. The United States.

No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

APPEALS FROM THE COURT OF CLAIMS.

Amended Motion to Pass Cases and to Assign Them for Argument on First Monday of May, 1928.

WILLIAM B. DEVOE,
Counsel for Appellants in Nos. 3, 4, 5, 6, 10 and 11.
EDGAR W. HUNT,
Counsel for Appellants in Nos. 7, 8 and 9.
MAXWELL C. KATZ,
For Counsel for Appellants in No. 12.

IN THE

Supreme Court of the United States

October Term, 1927

No. 1. Rhederei M. Jebsen Company, Appellant, v. The United States.

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No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

APPEALS FROM THE COURT OF CLAIMS.

Amended Motion to Pass Cases and to Assign Them for Argument on First Monday of May, 1928.

This amended motion is filed pursuant to leave granted in open Court, on October 3, 1927.

Now come the appellants in Numbers 3 to 12, both inclusive, of the above-entitled actions, by their attorneys in that behalf, duly authorized, and respectfully move the Court that all the above-entitled actions, Numbers 1 to 12, both inclusive, be passed when called for argument in their regular order and be assigned for argument for the first Monday of May, 1928; and as grounds for this motion assign the following:

1. These are the so-called "German Ship Cases," and the appellants therein claim compensation for ships and other property expropriated by the United States during the late war with Germany. They are before this Court on appeal from judgments of the United States Court of Claims, which sustained demurrers interposed by the Government and dismissed the complaints in all of said actions on the ground that said Court had no jurisdiction.

2. All twelve of said actions were heard together in the Court of Claims, which, selecting the above-entitled action Number 12 as a typical ship case, delivered therein an opinion stating the grounds and reasons for its decision; and disposed of all the other cases (including Numbers 1 and 2) by memoranda referring to said opinion. (For said opinion, see 59 Ct. Cls., 450; for the memorandum disposing of Numbers 1 and 2, see Ibid., 462.)

3. The ships formerly owned by appellants in Numbers 1 and 2, like those owned by the appellants in the other cases, were taken by the United States under authority of a Joint Resolution of Congress, approved May 12, 1917 (Chapter 13, 40 Stats., 75), and appellants in all of said cases which involved the taking of

ships rely upon said Joint Resolution as the foundation of their respective claims. (See Petitions to Court of Claims, printed in Record of the respective cases in this Court.) Since the passage of the Joint Resolution of May 12, 1917, no legislation has been enacted that alters or affects legal rights or remedies (whatever they may be) arising in consequence of the taking of any ship or ships under said Joint Resolution. The ships taken from appellants in Numbers 1 and 2, like those taken from appellants in the other cases, were at the time of taking under German flag and register, and their owners were German subjects or corporations formed under the laws of one or another of the constituent States of the German Empire, as existing in 1917; appellant in Number 1 being then a corporation organized under the laws of the German Province of Schleswig-Holstein, and appellants in Number 2 being German subjects who were residents of said Province (see Petitions to Court of Claims, printed in Record of actions Numbers 1 and 2).

4. The Danish nationality now alleged to be possessed by appellants in Numbers 1 and 2 is stated in their petitions in the Court of Claims (see Record in Number 1, paragraph 1, and appellants' brief in Number 1—(Number 102 of the October 1925 Term of this Court)—page 25) to have been acquired by virtue of a plebiscite held pursuant to Articles 109, 112 of the Treaty of Versailles. The date is not stated, but the Court will take judicial notice of the fact that the Treaty of Versailles was not signed until June, 1919, and that ratification, necessary to make it effective as among any of the signatory powers, did not occur until sometime later.

The Government argues this group of cases in one

brief, and, taking the above-entitled action Number 1 (No. 102 of the October Term, 1925) as a typical ship case, discusses it at length; and, in answering the claims of the other appellants in their respective ship cases, merely refers to its argument in the above-entitled Number 1, saying, "These cases differ in no special respect from Number 102 (Rhederei M. Jebsen vs. The United States)" * * * and "The brief for the Government in Number 102 (Rhederei M. Jebsen Company vs. The United States) covers every question in these cases." The Government's brief does not at all refer to the Treaty of Versailles or the newly-acquired Danish citizenship of appellants in Numbers 1 and 2.

5. Appellants in Numbers 1 and 2 were the owners of two ships, comprising together about 3,000 tons, gross register, out of 106 ships, comprising altogether about 640,000 tons, gross register, of merchant ships taken by the United States under said Joint Resolution, and recovery of the value of which is sought in the above-entitled actions. The two ships owned by appellants in Numbers 1 and 2 were cargo vessels of relatively low speed, while about two-thirds of the aggregate tonnage taken consisted of passenger, or combined passenger and cargo, ships of relatively high speed, so that it can not be said that appellants' 3,000 tons, gross register, fairly represent as much as 3/640ths in value of the expropriated vessels.

6. H. R. 15009 was passed in the House of Representatives at the last session (69th Congress, 2d session) by a vote of 279 to 66. It provided for the appointment of an arbitrator to determine the value of the expropriated ships, one radio transmission station,

and a comparatively small number of patents taken and used by the United States Government itself (not patents sold by the Alien Property Custodian and involved in the Chemical Foundation case). The Bill limited the awards to be made by the arbitrator to an amount not to exceed $100,000,000. Having regard to the possible maximum value of the radio station and patents, it was conservatively estimated that this provision would allow awards of at least $85,000,000 as compensation for ships. The Bill authorized an initial appropriation of $50,000,000 on account of the arbitrator's awards.

7. This bill also contained the following provisions:

"*Declaration of Policy*

"Sec. 2. In pursuance of established American doctrine, it is hereby declared that the claims of nationals of the United States against Germany, as determined by the Mixed Claims Commission, United States and Germany, shall be settled by the ultimate payment in full by Germany; that all property of German nationals held by the Alien Property Custodian as security for the payment of such claims of nationals of the United States against Germany shall ultimately be returned, together with the accrued interest and other earnings thereon; that the claims of German nationals against the United States for reasonable compensation for certain of their ships, radio stations, and patents taken or used by the United States shall be adjudicated and the amounts determined to be due shall ultimately be paid in full.

* * * * * * * * *

"Sec. 4

* * * (o) No award or tentative award shall be made by the Arbiter in respect of any claim if (1) such claim is filed after the expiration of four months from the date on which the Arbiter takes

office, or (2) any judgment or decree awarding compensation or damages in respect thereof has been rendered against the United States, and if such judgment or decree has become final (whether before or after the enactment of this Act), or (3) any suit or proceeding against the United States, or any agency thereof, is commenced or is pending in respect thereof and is not dismissed upon motion of the person by or on behalf of whom it was commenced, made before the expiration of six months from the date on which the Arbiter takes office and before any judgment or decree awarding compensation or damages becomes final."

* * * * * * * * *

"Definitions

"Sec. 14. As used in this Act—

(a) The term 'person' means an individual, partnership, association, or corporation.

(b) The term 'German national' means—

"(1) An individual who, on April 6, 1917, was a citizen or subject of Germany, or who, on the date of the enactment of this Act, is a citizen or subject of Germany.

"(2) A partnership, association, or corporation, which on April 6, 1917, was organized or created under the law of Germany but excluding any such partnership, association, or corporation, more than 50 per centum of the interest or voting power in which was on April 6, 1917, or on the date of the enactment of this Act, vested (directly or indirectly) in citizens or subjects of Austria, Hungary, or Austria-Hungary.

"(3) An individual (other than a citizen or subject of Austria, Hungary, or Austria-Hungary) whose claim is based upon an interest on April 6, 1917, in a partnership, association, or corporation excluded under paragraph (2).

"(4) The Government of Germany."

8. When the Bill came to the Senate it was referred to the Committee on Finance, which, by its Chairman, Mr. Smoot, submitted a report recommending its passage with certain amendments. From the report the following is quoted:

> "(3) The United States Government seized or acquired during the war for its own use certain property (notably ships, patents, and a radio station). Although the United States paid the Alien Property Custodian for the patents and the radio station acquired from him, it has paid no compensation for the ships. Consequently, some provisions must be made for the payment of the amounts justly due."
>
> * * * * * * * * *
>
> "One hundred and six ships were taken over. Some of them have been sold, some were chartered, some destroyed during the war, some have been scrapped, and some are still being operated by agencies of the United States. Upon all the ships in operation, considerable sums have been expended for betterments, improvements and repairs. It is obviously impossible to return them to their original owners. Consequently the United States has no choice but to pay for them."

9. On March 3, 1927, Senator Smoot, on the floor of the Senate, stated that the Committee on Finance had further modified the Bill so as to strike out any reference to radio stations and patents and fixed the maximum amount possible to be awarded for the ships at $85,000,000. The following is quoted from page 5552, first column, of the Congressional Record of March 3, 1927 (by Mr. Smoot):

> "Disagree to the committee amendment which strikes out from page 6, line 19, to page 17, line

22, and inserts new matter." The effect of this, in substance, is to restore the original House provisions, subject, however, to certain relatively slight amendments, the most important of which is the following:

"On page 10, line 14, strike out $100,000,000 and insert in lieu thereof $85,000,000."

Mr. Smoot also said (Ibid., second column):

"Mr. President, I will say to the Senate that if these amendments shall be agreed to, I have as much assurance as I could have from individuals that the bill, together with the amendments, will be passed by the House of Representatives; and I hope that the occasion will now arise when the importance of the bill will be definitely decided in the minds of Senators and they will realize what it means if it shall fail of passage."

10. The Bill failed of passage in the Senate solely because of the filibuster carried on during the last four or five days of the session. Senators of both parties repeatedly sought to have it brought to a vote, declaring that it ought to be passed. No Senator expressed any opposition to its passage, but solely by reason of the filibuster it was not permitted to be voted upon. In that respect it was treated exactly as were the Deficiency Appropriation Bill and Public Buildings Bill, two of the most important among the many measures that because of the filibuster could not be brought to a vote.

11. The U. S. Daily of July 16, 1927, printed what purports to be a literal quotation of a statement by Representative Oldfield of Arkansas, from which the following excerpt is taken:

"I take it for granted that Congress, regardless of political partisanship, will want first of all to take care of the Mississippi Valley situation. Then will come the tax reduction, the returning to their owners of the alien property held in the custody of the Alien Property Custodian, the disposition of Muscle Shoals, and the Boulder Dam proposition. These are the major matters that will be considered by the incoming Congress. Of course, added to these, are the appropriation bills, the supply measures for running the machinery of Government, that must be passed before Congress adjourns next summer."

The same paper, in the same issue and article, states:

"Representative Hawley (Rep.) of Salem, Oregon, who reported the alien property bill to the House at the last session, recently stated orally that he expects to reintroduce it in the new Congress and expects it to become law."

12. The U. S. Daily of July 15, 1927, under the head lines:

"Treasury Desires That Congress Act on Alien Property.
Legislation at Next Session Expected to Provide Return of Seizures During War."

prints the following:

"The Department of the Treasury is hopeful that Congress at its next session, will enact legislation disposing of the tangled alien property question, according to the Acting Secretary of the Treasury, Ogden L. Mills."

* * * * * * * * *

"'If, as seems likely,' said Mr. Mills, 'most of the property involved is owned in Germany, its early return might facilitate payments under the Dawes reparation settlement in the next few years. This property does not belong to the United States and should be restored to the rightful owners.'

"A bill to restore the property and to pay the American claims was considered at the last session of Congress but failed to become law. This bill on which hearings were held by the House Committee on Ways and Means was prescribed by the Acting Secretary as satisfactory to the Department and he hoped that it would take precedence even over tax legislation. He said he saw no valid reason why, after being reintroduced, it should not be acted on by Congress at an early date inasmuch as it has been thoroughly discussed and most members of the House and Senate are familiar with all of the questions involved."

13. The Journal of Commerce of New York (August 5, 1927) prints the following under a Washington headline:

"Early passage of the bill to return to former owners the property still under the control of the Alien Property Custodian is anticipated by Under Secretary of the Treasury Ogden L. Mills.

* * * * * * * * *

"Similarly optimistic is the Alien Property Custodian, Howard P. Sutherland. He feels that the matter should be brought to a termination since it is now nearly ten years since the close of the war."

14. The U. S. Daily of August 9, 1927, prints a long article purporting to state views expressed by Senator Smoot, the first paragraph of which is as follows:

"Senator Smoot (Rep.), Utah, Chairman of the Senate Committee on Finance, in an oral statement on August 8, predicted that legislation for the disposal of property now held by the Alien Property Custodian would be enacted during the next session of Congress."

CONCLUSION.

It is respectfully submitted:

(a) That the steps actually taken in Congress at the last session, together with statements made by responsible officers of the Government since, as above set forth, reasonably indicate a strong probability that action will ensue at the coming session, rendering a decision in these cases not only unnecessary but in a practical sense nugatory.

If the legislation enacted shall be unacceptable to the appellants in Numbers 1 and 2 (as counsel in these cases intimated in open court on October 3), they will if this motion is granted have opportunity in May to argue and submit their cases to this Court; and, if their claim of a special status based upon newly-acquired Danish nationality is valid, their rights will be unaffected by legislation relating to the rights of *German* ship owners alone.

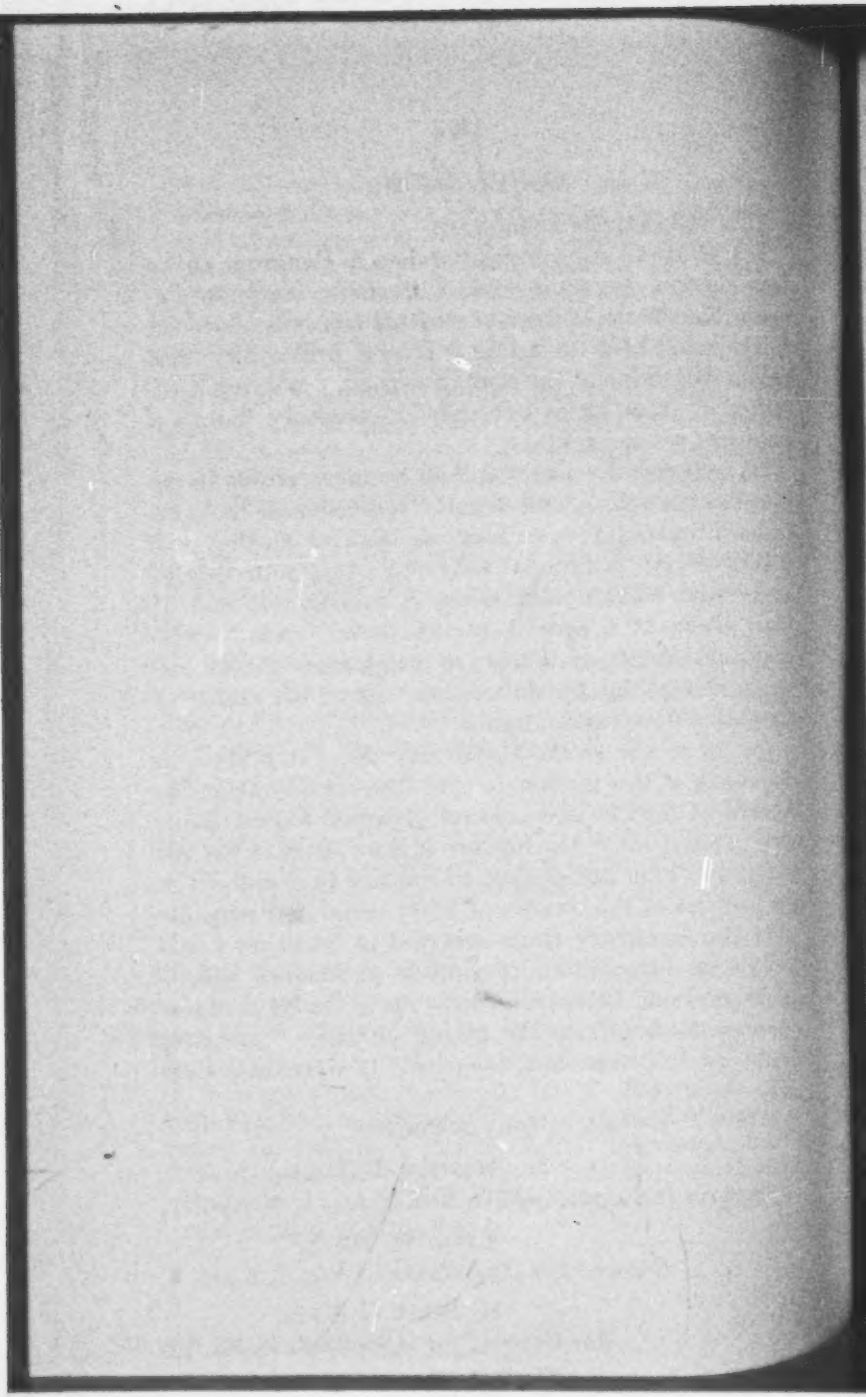
(b) In so far as the Court may deem it proper, in disposing of this motion, to take into consideration the desires of parties and counsel, it would seem reasonable to postpone at the request of the owners of 637,000 registered tons rather than to proceed to argument at the request of the owners of 3,000 registered tons, despite the secondary claim asserted in Numbers 1 and 2 that the acquisition of Danish nationality, subsequent to June, 1919, *ipso facto* alters the legal consequences flowing from the taking in 1917 of property whose owners were then concededly of German nationality.

Respectfully submitted,

WILLIAM B. DEVOE,
Counsel for Appellants in Nos. 3, 4, 5, 6, 10 and 11.

EDGAR W. HUNT,
Counsel for Appellants in Nos. 7, 8 and 9.

MAXWELL C. KATZ,
For Counsel for Appellants in No. 12.



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APPEALS FROM THE COURT OF CLAIMS.

Objections to the Motion to Pass and Reassign Cases No. 1 and 2.

WILLIAM F. NORMAN,
JAMES J. LYNCH,
Attorneys for Appellants in Cases Number 1 and 2.
DANIEL R. WILLIAMS,
Of Counsel.

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APPEALS FROM THE COURT OF CLAIMS.

Objections to the Motion to Pass and Reassign Cases No. 1 and 2.

Appellants in cases Number 1 and 2, Rhederei M. Jebsen Company and The Firm of M. Jebsen, etc., *et al,* respectively, submit herein their objections to the motion made on behalf of the appellants in cases Number 3 to 12, inclusive, to wit, that cases Number 1 to 12 be passed and reassigned:

I. Appellants in Numbers 1 and 2 have not agreed to consolidate their cases with appellants in Numbers 3 to 12; nor have they agreed that all the cases should be heard together.

Separate appeals were perfected by appellants in Numbers 1 and 2 and briefs were filed by them without conferring with counsel for appellants in Numbers 3 to 12, and without regard to the questions advanced in the latter cases.

II. Appellants in Numbers 1 and 2 are Danish subjects, having become such pursuant to the plebiscite ordered by Article 109 of the Treaty of Versailles, which plebiscite provided that the zone in which Apenrade (the residence of appellants in Numbers 1 and 2) is situated should determine whether that zone should remain a part of Germany or become territory of Denmark. Under such plebiscite the zone referred to voted to return to Denmark and has now become incorporated as a part of the latter country. By Article 112 of the Treaty of Versailles, it is provided:

> "But the inhabitants of the territory which was returned to Denmark will acquire Danish nationality *ipso facto* and will lose their German nationality."

By Article 278 of the Treaty of Versailles it is provided:

"Germany undertakes to recognize *any new nationality* which has been, or may be, acquired by her Nationals under the laws of the allied powers in accordance with decisions of the competent authorities of those powers, *pursuant to naturalization laws or under treaty stipulations*, and to regard such persons as having, in consequence of the acquisition of such new nationality, *in all respects severed their allegiance to their country of origin.*"

Furthermore, Sub-division (i), Article 297 of the Treaty provides:

"Germany undertakes to compensate her Nationals in respect to the sale or retention of their property, etc."

In view of this situation the articles of the Treaty referred to have established the following:

1. That Germany is obligated to recognize the new nationality of appellants Number 1 and 2 and to deem them as having "severed their allegiance" to their country of origin, *i. e.*, Germany;

2. That Germany's obligation to compensate her Nationals precludes the appellants in Numbers 1 and 2 from seeking compensation from Germany;

3. That the appellants become *ipso facto*, and are now, Danish subjects, and have forfeited their rights to demand indemnity from Germany on account of the loss of its ships. Unless, therefore, payment is made by the United States for said ships, then we have the anomalous situation of these appellants suffering a total loss of their property as Danish citizens, whereas had they remained of German nationality, they would now be entitled to compensation under the agreement of Germany. *This change of status of former German subjects under the Versailles Treaty, with the new obligations of our government with respect thereto, has been expressly recognized by Congress and also by the Treaty concluded by the United States with Germany in August, 1921, wherein and whereby the*

United States accepts and adopts the whole of Part 10 of the Treaty of Versailles, in which Part Article 297 is included.

To meet this situation, and to do equity to those who ceased to be German subjects by virtue of Treaty provisions, the United States Congress, by amendment of June 5, 1920, to the "Trading with the Enemy Act," provided as follows:

> "Provided, that no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, *even though he was such citizen or subject at the time first specified in this sub-section*, if he has become or shall become *ipso facto* or through exercise of option, a citizen or subject of any nation or State or free city *other than Germany, Austria or Hungary* (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following named powers: The British Empire, France, Italy and Japan (of the other part)."

It will thus be seen that appellants in cases Number 1 and 2, having acquired Danish nationality prior to the ratification of the treaty between the United States and Germany of 1921 (under which treaty Germany assumed to relieve the United States of all obligations with reference to the payment of her Nationals for property seized), lost all right to claim or receive compensation from Germany for losses suffered at the hands of the allied or associated powers. (42 Stats. at Large, Part 2, Sec. 5.)

Appellants in cases Number 1 and 2 do not now insist that they *acquired* additional rights by virtue of this change of status, but they do insist that by virtue

of the treaty referred to, they occupy a position in this court which is dissimilar and distinct from that occupied by appellants in Numbers 3 to 12, both as to questions of law and questions of fact.

III. It is not our desire to prejudice the rights of the other appellants, but inasmuch as the opinion of the Court of Claims refers to the decisions of this court in the cases of *Hijo v. United States*, 194 U. S. 315, and *Herrara v. United States*, 222 U. S. 558, it is our duty to call the court's attention to the fact that whatever effect these decisions may have on the rights of the other appellants, they can not affect the rights of the appellants in cases Number 1 and 2. In the *Herrara Case* the court said:

> "* * * If Spanish subjects, under the authority of the case of Hijo v. United States, their *right of indemnity* for the seizure and use of their vessels was *taken away* by the treaty between Spain and the United States."

Inasmuch as appellants in actions Number 1 and 2 became Danish subjects prior to the treaty between Germany and the United States, they submit that *their rights* were not "taken away" by this treaty, in which Germany assumed the obligation to indemnify her own nationals.

This very serious distinction between the rights of appellants in cases Number 1 and 2 and the other appellants is too obvious for discussion. *In the face of this treaty with Germany we may readily understand why counsel for the appellants in the other cases are so anxious for congressional relief.* The insistence of appellants in cases Number 1 and 2, set out in our brief, filed in this court, at pages 25 to 27, is that they have a right to recover in this court under *an implied*

contract and that this right was not prejudiced by any subsequent treaty.

IV. The proposed bill referred to in the motion, which counsel for appellants in Numbers 3 to 12 insist will probably be passed by Congress at the next session, does not give to appellants in Numbers 1 and 2 complete relief. It only provides for partial payment and for long delay on the balance. The fact that the appellants in Numbers 3 to 12, *in view of their situation*, prefer to accept the hoped-for congressional relief rather than the amount sued for is no reason why the appellants in Numbers 1 and 2 should be delayed in the hearing of their cases at the request of litigants who are not interested therein nor parties thereto.

It is, therefore, respectfully submitted:

That counsel filing this motion have no right to control the time or manner of the hearing of cases Number 1 and 2, in which briefs have been filed in this court *for more than two years* and the cases twice continued, upon the representation of counsel for appellants in Numbers 3 to 12 that they had been assured that a measure for the relief of all the appellants would be enacted by Congress;

And that, notwithstanding the difference in the amounts involved and the benefit which might result to appellants in Numbers 3 to 12 by way of congressional relief, counsel for appellants who are not seeking such relief can not accede to this motion, for to do so would be to prejudice the interests of said appellants, which our duty to them will not permit.

Respectfully submitted,

WILLIAM F. NORMAN,
JAMES J. LYNCH,
Attorneys for Appellants in Cases Number 1 and 2.
DANIEL R. WILLIAMS,
Of Counsel.

Office Supreme Court, U.
FILED
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CHARLES ELMORE CROPLE
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IN THE

Supreme Court of the United States

October Term, 1927

No. 1. Rhederei M. Jebsen Company, Appellant, v. The United States.

No. 2. The Firm of M. Jebsen, etc., et al., Appellants, v. The United States.

No. 3. Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States.

No. 4. Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States.

No. 5. Atlas Line Steamship Company, Appellant, v. The United States.

No. 6. Atlas Line Steamship Company, Appellant, v. The United States.

No. 7. North German Lloyd, Appellant, v. The United States.

No. 8. North German Lloyd, Appellant, v. The United States.

No. 9. North German Lloyd, Appellant, v. The United States.

No. 10. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg-American Line), Appellant v. The United States.

No. 11. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg-American Line), Appellant v. The United States.

No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

APPEALS FROM THE COURT OF CLAIMS.

Motion to Pass Cases and to Assign Them for Argument on First Monday of May, 1928.

William B. Devoe,
Counsel for Appellants in Nos. 3, 4, 5, 6, 10 and 11.
Edgar W. Hunt,
Counsel for Appellants in Nos. 7, 8 and 9.
Maxwell C. Katz,
For Counsel for Appellants in No. 12.

IN THE

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No. 1. Rhederei M. Jebsen Company, Appellant, v. The United States.

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No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

APPEALS FROM THE COURT OF CLAIMS.

Motion to Pass Cases and to Assign Them for Argument on First Monday of May, 1928.

Now come the Appellants in Nos. 3 to 12 inclusive of the above entitled actions, by their respective attorneys in that behalf duly authorized, and respectfully move the Court that none of the above entitled actions (Nos. 1 to 12 inclusive) be heard on the fifth day of March next (the day heretofore set for the argument of the same), but that they all be assigned for argument on the seventh day of May next or on such later date in this or the next Term as the Court may deem proper; and as grounds for this motion said Appellants state the following:

1. These are the so-called "German Ship Cases," the argument of which, by order made by the Court on the tenth day of October last, was postponed until the fifth day of March then next, on the ground of anticipated legislation by Congress rendering their decision unnecessary.

2. In December last, the House of Representatives passed, by a vote of 223 to 26, the Bill known as H. R. 7201 and bearing the short title "Settlement of War Claims Act of 1928." On February 20th, 1928, the Senate passed said Bill, with amendments, without a record vote but by a large majority.

3. The Senate's amendments to the House Bill, while numerous, do not disturb its essential plan and are for the most part of a non-controversial character, and serve merely to clarify provisions of the House Bill, to supply omissions and to enlarge and extend the remedial scope of the measure.

4. As enacted by both Houses, the Bill contains provisions for the appointment of an arbiter to determine

the value of the German merchant ships, and of a radio station and of certain patents, and authorizes him to make awards therefor not exceeding one hundred million dollars in the aggregate, and authorizes an initial appropriation of fifty million dollars on account of payment of the awards. It also requires the owners of the ships, in order to obtain the benefit of these provisions, to dismiss any actions brought by them against the United States, based upon the taking of any of the ships, within six months after the arbiter shall have taken office.

5. One of the Senate amendments to the House Bill consists of additional sections according to Appellants in Nos. 1 and 2 of the above entitled actions, because of the Danish nationality acquired by them under the Treaty of Versailles, a special status and special rights not accorded Appellants in the other cases.

6. On February 21st, inst., the Senate and House respectively appointed members of a Joint Conference Committee to further consider said Bill and evolve a final draft satisfactory to both Houses, and counsel presenting this motion are informed and believe that those members who have had charge of the Bill in the two Houses anticipate that the Joint Conference Committee will be able without special difficulty to perform the function assigned to it and that its labors will require not to exceed about two weeks time, after which the perfected Bill may be expected to be reported to the two Houses for final passage, which may reasonably be expected prior to May seventh next.

7. Appellants respectfully submit that the further postponement of all the above entitled cases is reasonably warranted by the pendency of the legislation above mentioned and the circumstances indicating the probability of its early adoption.

Respectfully submitted,

WILLIAM B. DEVOE,
Counsel for Appellants in Nos. 3, 4, 5, 6, 10 and 11.
EDGAR W. HUNT,
Counsel for Appellants in Nos. 7, 8 and 9.
MAXWELL C. KATZ,
Counsel for Appellants in No. 12.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 102. H. 1

RHEDEREI M. JEBSEN COMPANY, *Appellant*,

No. 103.

THE FIRM OF M. JEBSEN, ETC. ET AL., *Appellants*,

vs.

THE UNITED STATES.

JOINT REQUEST OF APPELLANTS AND APPELLEE FOR RESTORATION OF CASES

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM F. NORMAN,
Attorney for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 102.

RHEDEREI M. JEBSEN COMPANY, *Appellant*,

No. 103.

THE FIRM OF M. JEBSEN, ETC. ET AL., *Appellants*,

vs.

THE UNITED STATES.

Now come the appellants and the appellee, by their counsel, in the above-entitled causes, and move the Court to restore cases Nos. 102 and 103 to the call, and assign them for the 19th day of April, 1926, under the provisions of Rule 18 Section 9.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM F. NORMAN,
Attorney for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 102.

RHEDEREI M. JEBSEN COMPANY, *Appellant*,

No. 103.

THE FIRM OF M. JEBSEN, ETC. ET AL., *Appellants*,

vs.

THE UNITED STATES.

District of Columbia, ss:

Personally appeared before me, the undersigned, William F. Norman, who, being by me duly sworn, did depose and say: That the reason for failure to present argument in the above causes when the same were called in November, 1925, and were by stipulation passed subject to restoration under the provisions of Rule 18, Section 9, was that at that time it seemed apparent that the relief prayed for would be granted by Congress, and the reason now assigned for the restoration is that it seems at this time equally apparent that the relief referred to will not be granted by Congress at its present session.

WILLIAM F. NORMAN,

Subscribed and sworn to before me this 9th day of April, 1926.

C. R. HEFLIN,
Notary Public, D. C.

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No. 102.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

RHEDEREI M. JEBSEN COMPANY, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is a suit by the appellant against the United States. The original petition was filed in the Court of Claims on June 29, 1923, and amended on February 19, 1924. The petition alleged that appellant was a duly organized and incorporated joint stock company under the laws of Schleswig-Holstein, Germany, and registered at the port of Apenrade prior to the outbreak of the European War; that pursuant to the Treaty of Versailles and the plebiscite held thereunder, the City of Apenrade and the province of Schleswig-Holstein became a part of the Kingdom of Denmark and claimant is now an incorporated joint stock company under the laws of said Kingdom:

The petition alleged:

> "That at the outbreak of the war in Europe in 1914, the said company then owned and had in commission an eighteen hundred ton merchant steamship known as the Johanne, of the gross tonnage of 1,530.88 register tons, net tonnage of 952.06, length of 77.96 meters, breadth 11.03 meters, and depth 5.51 meters, and built at Lubeck, Germany, in 1903. When war was declared between Germany and France and the other allied powers, the said steamship took refuge in the harbor at Manila, Philippine Islands, and remained there until the same was seized by the Government, as hereinafter set forth."

It is alleged that on the day of the declaration of war, April 6th, 1917, this steamship was seized in the harbor at Manila Bay by the authorities of the United States Government and held and used until June 30, 1917, on which date the title to the property was taken over by the Government of the United States by virtue of an executive order of the President issued on June 30, 1917, made pursuant to a resolution of Congress passed on May 12, 1917.

The joint resolution referred to reads as follows:

> "Joint resolution authorized the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.
>
> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone, and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned *in whole or in part* by any corporation, citizen or subject of any nation with which the United States may be at war

when such vessel shall be taken, *or* was flying the flag of *or* was under register of any such nation *or* any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the Government to operate, lease, charter, and equip such vessel *in any service* of the United States, or *in any commerce, foreign or coastwise.*

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenance, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence *in all proceedings on any claim for compensation.*"

This was followed by the executive order of the President, as follows:

"AND WHEREAS, the following vessels were, at the time of coming into the jurisdiction of the United States, owned *in whole or in part* by a corporation, citizen or subject of the Empire of Germany, a nation with which the United States is now at war, *or* were flying a flag of *or* under the register of the Empire of Germany, or of a political subdivision or municipality thereof.

(Here follows a list of 99 ships, including the Johanne).

"It is therefore ordered that through the United States Shipping Board there be taken over to the United States the *possession and title* of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease, or charter the same *in any service* of the United States, *or in any commerce, foreign or coastwise;* and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth."

R. pp. 3 and 4.

It is alleged that this boat was taken over and used from April 6, 1917, to June 30, 1917, under an implied promise to pay for the value of its use, and that when the title was taken over under the joint resolution and executive order referred to, on June 30th, it was under an implied promise to pay the value thereof. It is alleged that the value of the use of this ship from April 6, 1917, to June 30, 1917, was Twenty-Three Thousand Dollars ($23,000.00), and that this ship was reasonably worth, at the time the title was taken by the United States Government on June 30, 1917, One Hundred and Seventy-Four Thousand Six Hundred Dollars ($174,600.00).

The name of said ship at the time it was owned by the petitioner was Johanne. After the title was taken over by the United States Government it was changed to Iosco.

Petitioner prayed for a recovery on the matters referred to in the sum of One Hundred Ninety-Seven Thousand Six Hundred Dollars ($197,600.00).

R. pp. 1 to 3.

The government filed a demurrer on two grounds;

1st—Because the petition failed to state a cause of action against the United States, and

2d—Because the cause of action was not within the jurisdiction of the Court of Claims.

R. p. 5.

The court sustained the demurrer and dismissed the petition. An appeal was properly prayed and granted to this Court.

R. pp. 6 to 13.

ASSIGNMENT OF ERROR.

The Court of Claims erred in sustaining the demurrer and dismissing appellant's bill because the United States Government appropriated appellant's property by legislative authority under an implied promise to pay for same, and appellant is entitled to recover the value thereof.

THERE WAS AN IMPLIED PROMISE TO PAY FOR THIS PROPERTY.

The property in controversy was taken over by the United States Government under authority of an Act of Congress, and used for governmental purposes. It is not insisted that the United States had any claim to this property prior to the seizure under the Act of Congress referred to. Appellant insists that there was a promise to pay implied from the lawful taking of this property in the manner referred to.

In the case of *United States vs. North American Transportation and Trading Company*, 253 U. S., 330, this Court said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor."

It is not necessary to show any express promise, or any sort of agreement with reference to paying. The promise to pay is implied from the taking. *United States v. Cress*, 243 U. S. 316. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645. *United States v. Lynah*, 188 U. S. 445.

The Court of Claims held, however, that there could be no implied promise to pay because this property was taken under the *war power* of the government. The Court did not hold, however, that the property was confiscated. The Court said:

> "We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value." R. pp. 12 and 13.

We know of but three ways that the government could rightfully have taken over this property as the private property of an enemy:

(a) By confiscation.
(b) By sequestration to hold in trust, or
(c) Under an implied promise to pay.

We shall hereinafter discuss fully the question of confiscation.

Asuming for the present that the property was not confiscated, we submit that there was an implied promise to pay, nothwithstanding it was taken over under authority of Congress in the exercise of its war power conferred by the Constitution.

In the case of *United States v. Russell*, 12 Wall. 623, it is expressly held that property taken from American citizens by officers of the government for use during the Civil War was rightfully taken in the exercise of the war powers of the government, and there arose from this taking an implied promise to pay. It appears that Russell was required to use his ships in the government service for a period of time. The order requiring this service reads as follows:

> "Imperative military necessity requires the service of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing."

Other ships were taken under similar orders. These ships were used by the government and suit was brought in the Court of Claims to recover compensation for their use. Among other things, the Court said:

> "Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to public good, but the Government must make full restitution for the sac-

rifice. Beyond doubt, such an obligation *raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats* and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitants assumpsit* is founded upon what the law terms *an implied promise on the part of the defendant to pay what, in good conscience he is bound to pay to the plaintiff.* But the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication, in a case where the act of payment would be contrary to duty or contrary to law."

In that case, as in the case at bar, it was insisted that the question of compensation for the use of these vessels was a *political* question to be settled by Congress and not a *judicial* question to be settled by the courts. In discussing this question, the Court said:

> "Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the services rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the Executive Department, and not to the Court of Claims."

After a full discussion of the Act of Congress authorizing suits in the Court of Claims, the Court concluded as follows:

> "Viewed in that light, the case is free of all difficulty, as the jurisdiction of the court, by the express words of the Act of Congress, extends to claims founded upon an implied contract as well as upon that which is expressed."

In the recent case of *Campbell v. United States,* 69 L. ed. (U. S. S. C. Adv. Ops., Jan. 1, 1925), p. 128, this Court approved the recovery in favor of the plaintiff for property taken by the United States Government during the world war. The Court said:

"In 1918 the United States, to aid in the prosecution of the war, had determined to build a nitrate plant at Ancor in the Little Miami Valley, near Cincinnati, Ohio. In order to get a site, it had taken possession of many parcels of land making up a large tract, adjoining plaintiff's estate of 69.73 acres. August 31, 1918, an officer of the Army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent, or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land, which was separated from the remainder by a public road."

And as a result of this taking, the Court said:

"And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss."

It is true the case at bar differs from the cases cited, in that the ships taken under the joint resolution of Congress were owned "in whole or in part" by enemies, but this would make no difference in the principle announced if the ships were not *confiscated* as enemy property. If the joint resolution, in the light of our past and contemporaneous history shows that compensation was intended, or if our treaty obligations, or international law and national good faith require that compensation should be paid for these ships, then the law implies a promise to pay, and the question is one for judicial determination, notwithstanding the property was taken by authority of Congress in the exercise of its war power.

It must be remembered that Congress was dealing not only with property owned by enemies, but with property in which American citizens or neutrals might have an interest, inasmuch as the resolution authorized the seizure of ships owned by an enemy *in whole or in part*. Undoubtedly the seizure, under this resolution, of a ship in which an American citizen or a neutral had an interest, would give a right of action in the Court of Claims under the Tucker Act. Inasmuch as no distinction is made in the resolution be-

tween the interests owned by enemies and Americans or neutrals, it results that any right that an American or neutral might have to sue in the Court of Claims was not intended to be denied to an enemy, with reference to any interest in a ship seized under this resolution.

THE PROPERTY WAS NOT CONFISCATED.

Neither the declaration of war nor the existence of a state of war authorized the confiscation of the private property of an individual enemy. The confiscation of such property must be expressly authorized by an Act of Congress. *Brown v. United States,* 8 Cranch, 110.

It could hardly be insisted that the joint resolution authorizing the taking over of this property can be construed as authorizing its *confiscation.* The Court of Claims disclaims any such conclusion.

It will be observed that Congress authorized the seizure of any ship owned *in whole or in part* by any subject or citizen of any nation with which the United States was at war. Under this resolution a ship was subject to seizure if an enemy owned *any interest* whatsoever in it. A ship in which an American or a neutral owned a nine-tenths interest, and a German or Austrian a one-tenth interest, was just as much subject to seizure as a ship owned entirely by an enemy.

It will be further observed that the resolution provides that any ship might be seized, if owned *in whole or in part* by an enemy, *at the time it entered* any of the American ports named in the resolution. A ship owned by a German or Austrian might have entered an American port a year before the declaration of war by the United States, and his entire interest might have been acquired in the meantime by Americans or neutrals. Nevertheless, under this resolution such a ship was subject to seizure. We cannot, of course, assume that either Congress or the President intended to take *without compensation* the property of an American citizen, or a neutral, or property in which an American citizen or a neutral had any interest. Whatever

power Congress may have had with reference to the confiscation of the private property of an enemy, it cannot be said that Congress had the power to take the property of a neutral, or an American citizen, without compensation. The Court of Claims in its opinion erroneously states that in the exercise of its war power Congress is not limited by the 5th and 6th amendments. This Court has held directly to the contrary. In *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, this Court said:

> "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."

The same rule is laid down in *United States v. Cohen Grocery Company*, 255 U. S. 81.

We cannot assume that Congress intended to disregard the rights of American citizens or neutrals under the 5th amendment. *Baender v. Barnett*, 255 U. S. 224.

Inasmuch as the Act applies equally to the interests of neutrals, Americans, and enemies, we must assume that Congress intended that the owners of these ships should receive compensation therefor. This is further shown by Section 2 of the resolution, in which it is provided that a board shall be appointed to value this property, and that a written report as to such valuation shall be filed with the Secretary of the Navy, and—"these findings shall be considered as competent evidence *in all proceedings in any claim for compensation.*"

We cannot assume that Congress or the President intended to confiscate this property, or take it without compensation, for the following additional reasons:

(a) Such a course would have been inconsistent with the traditional policy of the United States.

(b) Under well-established principles of international law, said ships could only have been taken as prizes of war, without compensation, after condemnation by a prize court.

(c) The taking of these ships without compensation would have been inconsistent with the declaration of the Hague Conferences of 1899 and 1907.

(d) The messages of the President, and the Congressional debates and reports show that confiscation was not intended.

We will discuss these propositions in the order stated.

THE CONFISCATION OF THIS PROPERTY WOULD BE INCONSISTENT WITH THE TRADITIONAL POLICY OF THE UNITED STATES.

In the *Buena Ventura*, 175 U. S. 384, at 388, Mr. Justice Peckham said:

> "It is, as we think, historically accurate to say that *this Government has always been, in its views, among the most advanced of the governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war.* To accomplish that object *it has always advocated* those rules which would in most cases *do away with the right to capture the private property of an enemy on the high seas.* 3 Wharton Int. Law Digest, Sec. 342. The refusal of this Government to agree to the declaration of Paris was founded, in part, upon the refusal of the other Governments to agree to the proposition exempting private property not contraband from capture upon the seas."

It would unnecessarily extend this discussion to quote from the messages and State papers of all the American Presidents and statesmen who have advocated the exemption of private merchant property for capture and confiscation at sea in time of war. Among the American statesmen who have made efforts to this end are Adams, Franklin, Jefferson, Hamilton, Calhoun, Van Buren, Pierce and Marcy.

President McKinley, in his annual message of December 5, 1898, made the following recommendation:

> "The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sus-

tained in time of war by peaceable trade and commerce. It is true we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement *to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficient principle,* and is now in a position to recommend it to other powers without the imputation of selfish motives. I, therefore, suggest for your consideration that the executive be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations *the principle of the exemption of all private property at sea,* not contraband of war, from capture or destruction by belligerent powers."

President Roosevelt in his annual message on December 7, 1903, quoted this extract from the message of President McKinley, and added:

"I cordially renew this recommendation."

He then quoted an extract from the opinion of Mr. Justice Peckham, and added:

"I advocate this as a matter of humanity and morals. It is anachronistic, when private property is respected on land, that it should not be respected at sea."

CONFISCATION OF THESE SHIPS, WITHOUT CONDEMNATION BY A PRIZE COURT, UNAUTHORIZED BY INTERNATIONAL LAW.

We cannot assume that Congress intended to violate well established principles of international law. In the case of *Ware, Administrator v. Hylton,* 3 Dallas, 199 (1 L. ed., pp. 568, 603), Mr. Justice Wilson said:

"When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement."

In the case of *MacLeod v. United States*, 229 U. S. 416, 435 (57 L. ed., 1260, 1268), this Court said:

"The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law."

By a long settled rule of international law a ship may not be legally confiscated until it is condemned by a prize court. Hon. John Bassett Moore, in the 7th Volume of his digest of International Law, page 630, in discussing this subject, says:

"When a vessel is captured, the rule is to bring her into some convenient port of the government of the captor for adjudication. The mere fact of capture does not work a transfer of title, and until there is a sentence of condemnation or restitution, the captured vessel is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

"Demand against property captured as prize of war *must be adjusted in a prize court.* The property arrested as prize is not attachable at the suit of private parties; and if such party have claims which in their opinion override the rights of the captors, they must present them to the prize court for settlement. The jurisdiction of a prize court over a captured vessel is determined by the capture and not by the filing of a libel.

"The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. *Slocum v. Mayberry, 2 Wheat. 1; The Appollon, 9 Wheat. 362; the*

Lively, 1 Gall. 314; The Corier Maritimo, 1 Rob. 287.

"A Chilean cruiser having seized on the high seas certain paper currency destined for the Peruvian Government, and the Chilean forces in Peru having afterwards, without judicial condemnation of the property, which was claimed to belong to citizens of the United States, put such currency into enforced circulation in Peru in payment for supplies taken by the Chilean army, the Government of the United States said: 'The capture of the property having been made on the high seas and no prize court having inquired into the authority of the captor or the liability of the property under the public law to be seized, that act might in strictness be regarded as practical in its character. *By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize.* Before the ship or goods can be disposed of by the captor, *there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation had thereon as prize in a court of admiralty, judging by the law of nations and treaties.*' Wildman's International Law, Vol. 2, p. 352."

This Court, in the case of *Oakes v. United States*, 174 U. S., 778, said:

"By the law of nations, *as recognized and administered in this country,* when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors. *1 Kent. Com. 102, 110; Halleck's International Law, Chap. 19, Sec. 7, Chap. 30, Sec. 4, Kikr v. Lynd, 106 U. S. 315, 317 (27: 193, 195).*"

As we shall hereinafter show, this principle of international law was confirmed by a solemn convention, *to which both the United States and Germany were parties,* at the Hague Conference in 1907.

Under the resolution and executive order of the Presi-

dent, these ships were seized and the title taken over by the United States without any judicial proceeding—without due process—without an opportunity for the owners to be heard and assert their rights in any court. The President determined by his executive order that these ships came within the terms of the resolution of Congress. He was authorized to do this by the resolution. It was obviously not intended by this summary proceeding to deny to the owners of these ships their day in court. It must have been assumed that they would be permitted to assert their claims for compensation in the proper tribunal. It cannot be assumed that either Congress or the President intended to violate the laws of nations or our treaty obligations.

THE TAKING OF THESE SHIPS WITHOUT COMPENSATION WOULD BE INCONSISTENT WITH THE DECLARATION OF THE HAGUE CONVENTION OF 1907.

Article 46 of the agreement with reference to "The Laws and Customs of War on Land" adopted at the Hague Convention in 1899, provides as follows:

> "Family honors and rights, individual lives and *private properties* as well as religious convictions and liberties must be respected.
>
> "Private property cannot be confiscated." *Scott's Hague Conventions and Declarations of 1899 and 1907*, page 123.

This was re-enacted at the Convention of 1907.

The delegates from the United States to the Hague Convention of 1907, received the following instructions:

> "Since the conference has its chief reason of existence in the heavy burdens and cruel wastes of war, which nowhere affect innocent private persons more severely or unjustly than in the damage done to peaceable trade and commerce, *especially at sea*, the question of exempting private property from destruction or capture on the high seas would seem to be a timely one for consideration.

"As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the conference the principle of extending to strictly *private property at sea* the immunity from destruction or capture by belligerent powers which such property already enjoys on land *as worthy of being incorporated in the permanent law of civilized nations.*"

At that convention Article I of Convention VI was adopted on October 18, 1907. It provides as follows:

"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in any enemy port, it is desirable that *it should be allowed to depart freely, either immediately or after a reasonable number of days of grace,* and to proceed, after being furnished with a pass, direct to its port of destination or to any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out."

Article 2 provides:

"A merchant ship unable, owing to circumstances of *force majeure,* to leave the enemy port within the period contemplated in the above article, *or which was not allowed to leave, cannot be confiscated.*

"The belligerent may only *detain* it, without payment of compensation, but subject to the obligation of restoring it after the war, *or requisition it on payment of compensation.*" *Scott's Hague Conventions and Declarations of 1899 and 1907,* page 141.

This agreement was ratified by nearly all the civilized nations of the world, except the United States.

It was not signed by the American delegates because of the provision in Article 1, allowing the detention of ships by a belligerent or requisition on payment of compensation. In other words, *the American delegates did not be-*

lieve that the ships should be detained at all. Hyde's International Law—Sec. 764.

This was in accordance with the declared policy of this Government. The practice of allowing enemy merchant ships a reasonable number of days of grace in which to return is fully discussed in Hyde's International Law, Vol. 11, Sections 763-764.

In concluding the discussion of this subject and of the Hague Convention referred to, Mr. Hyde says:

> "Provision for the detention, or requisition on compensation, of enemy vessels in port, in lieu of confiscation is a mark of respect for private property which should enjoy universal approval. *That respect is not lessened when a detained ship is either appropriated or destroyed, provided the owner is reimbursed for what he has lost in consequence of such action.*" *Vol. 2, Hyde's International Law*, page 522.

While the American delegates did not sign this article for the reason stated,—that it did not go far enough and forbid the detention of enemy merchant ships *altogether*, nevertheless it was a *declaration of international law* approved by practically all other civilized nations of the world, and while it is not binding on the United States *as a treaty*, it is entitled to the same respect as any other established principle of international law.

Mr. James Brown Scott in his introduction to his treaties on "The Hague Conventions," from which we have quoted, says:

> "It should, however, be pointed out that the failure of a belligerent to ratify a particular Convention only means that the Convention *as such* is not binding upon it; it does not mean and cannot mean that the principles of law contained in the Convention may not bind the conduct of the parties. It is, therefore, necessary still further to ascertain whether the provisions of the Convention are merely a codification of international law. In this event the provisions are *binding as international law*, although the Convention itself, or

this part of it, may be ineffective. A careful examination of the Conventions of the two Conferences will show that most of their provisions are declaratory, not amendatory, of international law, and that the failure of one Power or of any number of Powers to ratify them is merely to be regarded as the rejection of a codified text, not as the rejection of principles of international law, *which no power can reject without excluding itself from the society of nations.*"

Aside from the declaration of this Convention, as we have seen, this country is thoroughly committed to the principle that enemy merchants should not be confiscated in belligerent ports on the outbreak of war.

President McKinley allowed Spanish ships thirty days in which to return to their home ports on the declaration of the war against Spain in 1898.

In construing this proclamation, this court, speaking through Mr. Justice Peckham, in the case of *Buena Ventura v. United States,* 175 U. S., p. 384, said:

> "If inferences must be drawn therefrom in order to render certain the limitations intended, those inferences should be, so far as possible, in favor of the claimant in behalf of the owners of the vessel."

And again:

> "It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out, would, *in accordance with the later practice of civilized nations,* be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted."

We have already discussed the necessity for an adjudication by a prize court before private enemy property, captured at sea, can be legally confiscated.

This was confirmed by an agreement on October 15, 1907, at the Hague Conference. *Scott's Hague Conventions*, p. 188.

This convention made provision for the creation of an international prize court, which does not, however, interfere with the right of the belligerent captor to have the prize condemned in the first instance in his own court. *Ib.* p. 189.

To adjust the obvious difficulties in the creation of this court, a subsequent meeting was held on September 19, 1910, at which both Germany and the United States (as well as other leading nations) were represented.

The author from whom we are quoting, Mr. James Brown Scott, represented the United States at this conference. *Hague Conventions and Declarations*, pp. 204-208.

It would, therefore, appear that we are committed to this principle by this agreement, as well as by our obligation to observe the principles of international law.

THE ADDRESSES OF THE PRESIDENT AND THE DEBATES IN CONGRESS SHOW THERE WAS NO PURPOSE TO CONFISCATE THIS PROPERTY.

In the President's proclamation of war, on April 6, 1917, he assured all resident enemies that:

> "They shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due to all peaceful and law abiding persons."

In his address to Congress of April 2, 1917, Mr. Wilson said:

> "We have no quarrel with the German people. We have no feeling towards them but one of sympathy and friendship."

And again:

> "It will be all the easier for us to conduct ourselves as belligerents in a high spirit of right and fairness because we act without animus, not in enmity towards a people or with the desire to bring any injury or disadvantage upon them.
>
> "We are, let me say again, *the sincere friends of the German people,* and shall desire nothing so much as the early re-establishment of intimate relations of mutual advantage between us—however hard it may be for them, for the time being, to believe that this is spoken from our hearts."

In his address to Congress on December 4, 1917, the President said:

> "You catch with me the voices of humanity that are in the air. They grow daily more audible, more articulate, more persuasive, and they come from the hearts of men everywhere. They insist that the war shall not end in vindictive action of any kind; that no nation or people shall be robbed or punished because the irresponsible rulers of a single country have themselves done deep and abominable wrong. It is this thought that has been expressed in the formula, 'No annexations, no contributions, no punitive indemnities.' "

It would be useless to quote the various other addresses of the President in which he expressed the same sentiments. They are a part of the world's history.

In the discussion of this resolution, and the "Trading with the Enemy Act," not a member of the House of Congress expressed the view that private enemy property should be confiscated or taken without compensation. On the contrary, every opinion expressed on the floor of the Congress was to the effect that private property should *not* be confiscated.

The views of members of the Senate are well expressed in the report of the Senate Committee on the "Trading with the Enemy Act" (Senate Report No. 113, 65th Congress, 1st Ses.). This report states in part:

> "Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies *without confiscating it.*"

The report of the Committee on Interstate and Foreign Commerce to the House of Representatives, on June 2, 1920, expresses the view of that body, with reference to private enemy property as follows:

> "It was the intention of Congress when the property was taken that it should merely be held in custody during the war, and that after the war the property or its proceeds *should be returned to the owners.* It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our Government's claims against such belligerent. *Such practice is contrary to the spirit of international law throughout the world.*"

It is true that no express provision was made in the joint resolution for the bringing of suits in the Court of Claims or in any other court by the owners of these ships. No such provision was necessary. It already existed under the so-called Tucker Act.

As we have shown, the resolution authorized the seizure of ships, regardless of the interests owned by American citizens or neutrals in such ships. It certainly was not intended by Congress that these interests should be seized without compensation, or without the right to sue in the Court of Claims under the existing law.

No special provision was made for these interests, and no purpose is shown to confer upon the American or neutral owners of interests in these ships and rights not conferred upon the enemy jointly interested in the ownership of any such ships.

In view of the sentiments expressed by the President and Congress at the time of the passage of the joint resolution and the seizure of these ships, we cannot doubt that their purpose was to maintain the highest ideals of modern civil-

ization, and to observe the requirements and obligations of international law and national good faith.

In the light of the struggles made by American statesmen for more than a century to bring about an international agreement to prevent the seizure of private merchant ships at sea by belligerents, we must assume that the President and Congress did not intend to violate the declaration of the Hague Conference that enemy ships in our ports should not be seized at the beginning of war. On the contrary, it is perfectly obvious that Congress and the President intended to comply with that provision of this same declaration which permits the seizure of ship *with the obligation to make compensation therefor.*

AUTHORITIES CITED BY THE COURT OF CLAIMS.

The Court of Claims, in its opinion, states:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision which empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, No. 8, 11. See Stoehr v. Wallace, 255 U. S. 229-242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch, 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken by the Alien Property Custodian, in which even there would have been no jurisdiction in this court."

Whether this property could be taken over by the Alien Property Custodian under the "Trading with the Enemy Act," is not important. If this had been done, appellant's right to recover in the forum provided in that act could not be disputed.

The property taken over by the Alien Property Custodian was not *confiscated.* It was only taken over and *held in trust* for the owners. The *title* to the property taken over did not pass from the owners or become the property of the United States by virtue of the taking. The property was taken, under that act, not for the use of the United States Government, but was taken over and held temporarily, during hostilities, in order that it might not fall into the hands of the enemies of the United States. *Stoehr v. Wallace,* 255 U. S. 239. *Metropolitan Trust Co. v. Garvan,* 254 U. S. 554.

The Court of Claims cites several cases growing out of the capture by the Federal troops of property during the Civil War. These cases grow out of special statutes, and are not at all applicable. The Civil War legislation is briefly summarized in Vol. 7, Moore's International Law Digest, p. 291, as follows:

> "The Act of August 6, 1861, was passed by Congress in the exercise of its power 'to make rules concerning captures on land and water,' and was aimed exclusively at the seizure and confiscation of property *used in aid of the insurrection.* The act of July 17, 1862, proceeded upon the entirely different principle of confiscating property without regard to its use, *by way of punishing the owner for being engaged in rebellion and not returning to his allegiance.*"

Such legislation was also discussed in the opinion of this Court in *Oakes v. United States,* 174 U. S. 778.

The case of *Hijo v. United States,* 194 U. S. 315, cited by the Court of Claims, is clearly not in point.

The distinctions between that case and this are vital:

(a) The Court, speaking the plaintiff's demand in that case, says:

> "Its claim is not founded on the Constitution of the United States, *or on any Act of Congress,* or on any regulation of any executive department."

In the case at bar, appellant's claim is for property rightfully taken under an executive order based on the joint resolution of Congress:

(b) In the *Hijo* case the property was taken "within the limits of military operations," while the war was flagrant.

In the case at bar the ship seized was in an American port, and at a time when it was protected from *confiscation*, as we have seen, by well established principles of international law.

(c) In the *Hijo* case the court held that if the property taken was not properly confiscated, the taking was tortious for which suit could not be maintained in the Court of Claims. In the case at bar it is conceded that the property was *rightfully* taken under legislative and executive authority.

(d) In the *Hijo* case, the property was only used *temporarily* and was returned to the owners.

In the case at bar, the title to the property was taken over by the United States. The property was turned over to the "Shipping Board" and became permanently the property of the United States.

(e) And finally, the court held in that case that the plaintiff's claim was settled by the treaty of peace between Spain and the United States.

The case of *Herrara v. United States*, 222 U. S. 528, involved practically the same facts and was dismissed for the same reasons assigned in the *Hijo* case.

In the *Herrara case*, the Court called attention to the fact that there was a distinction between the right to seize property for the immediate uses of the army in the field, as was done in that case and the *Hijo* case, and the seizure of property for "booty" or gain. The court said:

> "This is a distinction important to observe, and it is recognized explicitly or implicitly in all the cases referred to in the able argument of counsel."

In the case at bar, the title as well as the possession of the property, was taken and turned over to the "Shipping

Board," with authority to use it in "any service" or in "any commerce, either foreign or coastwise."

APPELLANT'S RIGHTS ARE NOT AFFECTED BY THE TREATY WITH GERMANY IN 1921.

It is true that in the treaty between the United States and Germany, approved by Congress on July 2, 1921 (Sec. 5, 42 Stat. L., Part 2, 1940), Germany assumed to relieve the United States of all obligation with reference to the payment of her nationals for property seized. This was probably intended to apply only to property taken over under the "Trading with the Enemy Act."

This question, however, is not important to this appellant because it was not, at the time the treaty was entered into, or at the time it was ratified, a citizen or subject of Germany, and its rights are not affected by said treaty.

The appellant was a joint stock company, incorporated under the laws of Schleswig-Holstein, and became a subject of the Kingdom of Denmark in the following manner:

In Article 109 of the Treaty of Versailles a plebiscite was provided for the zone in which Apenrade is situated to determine whether that zone should remain as a part of Germany or become territory of Denmark. Under such plebiscite the zone referred to voted to return to Denmark and has now become incorporated as a part of the latter country. By Article 112 of the Treaty of Versailles, it is provided:

> "All the inhabitants of the territory which is returned to Denmark will acquire Danish nationality *ipso facto*, and will lose their German nationality. * * *"

By Article 278 of the Treaty of Versailles, it is provided:

> "Germany undertakes to recognize any new nationality which has been, or may be, acquired by her Nationals under the laws of the allied and Associated Powers and in accordance with the decisions of the competent authorities of these powers, pursuant to naturalization laws or *under Treaty stipulations*, and to regard such persons as having, in consequence of the ac-

quisition of such new nationality, in all respects severed their allegiance to their country of origin."

It cannot, of course, be insisted that the treaty between Germany and the United States affects the rights of any except German nationals. Germany, of course, had no right to speak for, or represent, any others.

At the time this treaty was entered into appellant's property had already been taken under an implied promise to pay, and its rights were vested and fixed. It had, at the time of this treaty, lost its German citizenship and had become a subject of the Kingdom of Denmark, and could be represented alone by that Government. What effect this treaty has upon the rights of those who retained their German citizenship it is not important to consider in this connection.

The Congress of the United States has by express enactment recognized the fact that those occupying appellant's status are not to be treated as German citizens. Subsection 8 of subdivision (b) of Section 9 of the Amendment of June 5, 1920, to the "Trading with the Enemy Act," provides:

> "* * * that no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this Section, even though he *was* such citizen or subject at the time first specified in this subsection, *if he has become, or shall become, ipso facto,* or through exercise of option a citizen or subject of any nation, or state, or free city other than Germany, Austria or Hungary, (first) under the terms of such treaties of peace, as have been, or may be, concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and or three or more of the following named powers: the British Empire, France, Italy and Japan (of the other part). * * *"

IN CONCLUSION.

We desire to emphasize the fact that the United States did not take over this property *exclusively* for war purposes. It was taken over under the *war power* of Congress,

and its taking was thought proper as a result of the fact that we were at war, but the property was taken over for *permanent use* by the "Shipping Board" with the right to use it in "any service," or "in any commerce, foreign or coastwise." If this property was not confiscated, which it could not have been consistently with the principles of international law and our treaty obligations,—if it was taken with the intention of making compensation, or in such a manner that our treaty obligations or the principles of international law would require compensation,—then, we submit, that under the Tucker Act the appellant was entitled to maintain its action in the Court of Claims. As has been frequently stated by this Court in the cases cited, there is an implied obligation to pay, and a right of action in the Court of Claims, whenever property *lawfully taken* by the United States for its own purposes is taken under such circumstances that "in good conscience" it ought to pay.

Respectfully submitted,

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(The italics used in this brief are ours.)

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APPELLANT'S BRIEF.

Supreme Court of the United States

OCTOBER TERM, 1925

No. 13.3

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

CHARLES H. LEFEVER,
Appellant's Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Constitution of the United States, Art. 1, sec. 8, cl. 11 (U. S. C. S. 1916—Vol. 10, p. 13947)	21
Constitution of the United States, 5th Amendment (U. S. C. S. 1916—Vol. 11, p. 14320)	5, 11
Judicial Code, sections 145, 155, 156, 242, 243	2, 3, 15, 16 17, 28
Rules of Ct. Cl. Rule 15 (2)	14
Stephen on Pleading (9th Am. Edition) pp. 143, 145, 342, 370	11, 14

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 108

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FOREWORD.

The Hamburg-American Line Terminal & Navigation Company, the appellant, was incorporated under the laws of the State of New Jersey on October 26, 1899 (R. 1, 4 and 10). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Hamburg-American Line Terminal & Navigation Company was beneficially held for said German corporation from October, 1899, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The

Alien Property Custodian exercised the rights of stock ownership and elected a Board of Directors for Hamburg-American Line Terminal & Navigation Company to manage and control its affairs (R. 1 and 2). The Alien Property Custodian seized no money nor other property belonging to the Hamburg-American Line Terminal & Navigation Company, as such money or other property was recognized as belonging to the corporation and not to its stockholders. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition in this case to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States, for property requisitioned by the United States from appellant, within the six-year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code, and, by leave of Court, filed an amended petition in said Court on February 19, 1924 (R. 1).

OPINION DELIVERED IN THE COURT OF CLAIMS.

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the amended petition of claimant below, holding that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and then, by way of further comment upon its decision, says: "The Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat. 459 and 1914), it must be presumed (1)to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property." Neither said Memoran-

dum nor said Opinion have been officially reported, but both appear in the printed Record (R. 12-19).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 12), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code and the Rules of the Supreme Court.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against the United States in the sum of $1,147,347.00 (R. 4), and the judgment entered in said Court and appealed from sustained a demurrer to claimant's amended petition and dismissed said petition (R. 12).

Claimant below filed a motion on May 14, 1924, for a new trial, and on May 26, 1924, the Court of Claims filed an order overruling said motion (R. 19). On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, both from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's petition on the grounds that the Court of Claims was without jurisdiction to hear and determine the case and from the order overruling claimant's motion for a new trial; and, on June 16, 1924, the Court of Claims allowed the appeal (R. 20).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized October 26, 1899 (R. 1), that many years prior to the United States declaring war upon Germany (April 6, 1917), it acquired title by purchase to and became seized in fee-simple of certain pieces, parcels, or tracts of land and premises, a part of which lie

under water, upon which lands are erected certain piers, warehouses, sheds, office and other buildings and improvements situated in the City of Hoboken, Hudson County, and State of New Jersey, more fully described in "Schedule A" to a Proclamation issued by the President of the United States of Amercia on the third day of December, 1918 (40 Stat. 1914-1918), which said lands and premises on April 6, 1917, had a clear rental value of $2,400.00 *per diem*, that on April 6, 1917, the United States, acting by and through the War Department, entered upon and took possession and control of said lands and premises and on April 20, 1917, acting as aforesaid, made its possession and control thereof exclusive by ejecting claimant therefrom and depriving claimant for all times thereafter from any further use and occupation of said lands and premises, said taking of the possession and control thereof having been accomplished by virtue of directions by the President to the Secretary of War, pursuant to the authority given to the President and the Secretary of War by the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), that on June 28, 1918, the President, acting under the authority vested in him by Act of Congress of March 28, 1918 (40 Stat. 459) issued a Proclamation (40 Stat. 1804-1805) declaring that the acquisition of title to claimant's said docks, piers, warehouses, wharves and terminal equipment and facilities on the Hudson River, to-wit: in the City of Hoboken, as aforesaid, to be necessary for the national security and defense, and did thereupon take over for the United States the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein, or appurtenant thereto, and he did by said Proclamation (40 Stat. 1804/5) furthermore declare that just compensation for the property thereby taken over would thereafter be determined and paid (R. 2 and 3), that on December 3, 1918, the President issued another Proclamation (40 Stat. 1914-1918) and did deter-

mine and declare therein that the just compensation to be paid to claimant for its said property, expropriated for the United States of America, to be the sum of $2,314,877.00, to be paid to claimant upon the satisfaction of record of all liens by way of mortgage, judgment, or otherwise existing on, and all taxes and assessments due and exigible upon the foregoing premises, or any part thereof, on the 28th day of June, 1918; that said sum of $2,314,877.00 was paid to claimant on January 5, 1919, but that, notwithstanding the payment to claimant of said sum, claimant received no rent or other compensation for the term or time beginning April 6, 1917, when the United States of America entered upon and took possession of claimant's said lands and premises, completed by the said taking pursuant to the Act of Congress of August 29, 1916, when the United States acquired title to said lands and premises under the Proclamation (40 Stat. 1804/5) made pursuant to the Act of Congress of March 28, 1918 (40 Stat. 459) and that although claimant was awarded on December 3, 1918, the sum of $2,314,877.00 for said title expropriated on June 28, 1918, it did not receive payment of said sum until January 5, 1919 (R. 3 and 4), and that claimant, by virtue of the provision contained in the Fifth Amendment to the Constitution of the United States, as expressed in the words "nor shall private property be taken for public use, without just compensation," was warranted in inferring the existence of an agreement on the part of the United States to pay claimant a reasonable price for the use and occupation of its said lands and premises for the term or time aforesaid and to compensate claimant further for the time claimant was deprived of the use of said sum of $2,314,877.00 after the title to said lands and premises was acquired by and passed to the United States (R. 3 and 4).

Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that it is with-

out jurisdiction to hear and determine the case (R. 12). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 20), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation.

CASE BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from judgments of the Court of Claims, one (R. 12) entered March 17, 1924, sustaining a demurrer to claimant's petition and dismissing the said petition on the grounds that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition, and another (R. 19) entered May 26, 1924, overruling claimant's motion of May 14, 1924, for a new trial. This case, therefore, comes before the Supreme Court of the United States in practically the same manner as did the case of A. W. Duckett & Co., Inc., v. United States (58 Ct. Cl. 234, 403), which was dismissed April 16, 1923, by the Court of Claims for want of jurisdiction, after findings of fact by the Court of Claims, and with respect to which a motion for a new trial was overruled May 28, 1923, by the Court of Claims upon the same grounds. In dismissing the Duckett case for want of jurisdiction, the Court of Claims held that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property acquired by the United States under said Act of August 29, 1916 (39 Stat. 645). From the judgments of the Court of Claims dismissing plaintiff's petition for want of jurisdiction and overruling plaintiff's motion for a new trial, plaintiff was allowed an appeal to the Supreme Court of the United

States, where the appeal was heard and decided, the judgment below being reversed, with directions to the Court of Claims to award proper compensation to the appellant (45 S. Ct. 38). In the present case, there were no findings of fact, as the dismissal for want of jurisdiction was by a judgment on demurrer, but under the established rules of pleading the facts alleged in claimant's petition were regarded, for the purpose of trying the issue raised by the demurrer, as true, and said facts, concisely stated above, make the present case with respect to the taking of claimant's property pursuant to the Act of Congress of August 29, 1916 (39 Stat. 645), almost analogous to the case of A. W. Duckett & Co., Inc., other than that claimant in the instant case was the absolute owner of the property taken, while plaintiff in the A. W. Duckett & Co., Inc., case held but a leasehold interest in the property taken.

In the case of A. W. Duckett & Co., Inc. (45 S. Ct. 38), Mr. Justice Holmes, among other things, said:

> "The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.
>
> * * * * * * *
>
> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdiction to hear and determine the appeal so brought by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its appeal points of fact and of law quite analogous to those

in the case so heard and determined, believes the case of A. W. Duckett & Co., Inc., sustains the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE

Suit was instituted in the Court of Claims of the United States on April 5, 1923 (R. 1), by appellant, claimant below, filing in said Court a petition alleging, among other things, the following pertinent facts:

That Hamburg-American Line Terminal & Navigation Company, the claimant, is a corporation created by and existing under the laws of the State of New Jersey, organized on the 26th day of October, A. D. 1899 (R. 1); that long prior to the United States declaring war upon Germany claimant by purchase acquired title to certain pieces of land and premises situated in the City of Hoboken, N. J., which, on April 6, 1917, had a *per diem* rental value of $2,400.00 (R. 2), that on April 6, 1917, the United States, acting by and through the War Department, took possession of said lands and premises and on April 20, 1917, made said possession exclusive by ejecting claimant therefrom and depriving claimant at all times thereafter from the use and occupation of said lands and premises, the Secretary of War, upon directions from the President, having taken possession and assumed control thereof, through the Quartermaster General, New York, under authority given by Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), (R. 2), that on June 28, 1918, the President, acting under authority vested in him by Act of Congress of March 28, 1918 (40 Stat. 459), issued a Proclamation (40 Stat. 1804/5) declaring the acquisition of said title to be necessary to the national security and defense and taking over for the United States said title, just compensation for the property to be determined and paid later (R. 2-3), that on December 3, 1918, the President issued another Proclamation (40 Stat. 1914/8) fixing the compensation to be paid

to claimant for its said property at $2,314,877.00, to be paid to claimant upon the satisfaction of record of all liens by way of mortgage, judgment, or otherwise, existing on, and all taxes and assessments due and exigible upon the premises, or any part thereof, on June 28, 1918, that on January 5, 1919, said sum of $2,314,877.00 was paid to claimant (R. 3), that notwithstanding the payment to claimant of said sum of $2,314,877.00, claimant received no rent or compensation for the term beginning April 6, 1917, when the United States took possession of said lands and premises, and ending June 28, 1918, when the United States acquired title to said lands and premises (R. 3), that claimant received no interest on said sum of $2,314,-877.00 from June 28, 1918, when the United States acquired title to the said lands and premises, to January 5, 1919, when said sum of $2,314,877.00 was paid by the United States to claimant (R. 3), that by way of said rent and interest claimant is entitled to receive $1,147,347. (R. 4), that claimant is the sole owner of the claim, that no assignments or transfer thereof or of any part thereof, or interest therein has been made (R. 4), and that claimant as a citizen of the United States has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States (R. 4).

On May 26, 1923, the defendant filed a demurrer to said petition (R. 12), the demurrer being worded, as follows:

> "Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States" (R. 12).

On March 17, 1924, the Court of Claims entered an order, as follows:

> "This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the de-

murrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the amended petition is dismissed" (R. 12).

SPECIFICATION OF ERRORS

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

2. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

3. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

4. The Court of Claims committed error in holding it it must be presumed, the Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat. 459 and 1914), (1) to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property.

ARGUMENT

I

The Court of Claims committed error in sustaining defendent's demurrer to claimant's amended petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

> "Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States" (R. 12).

This demurrer in form and substance is a general demurrer, raising but a single issue, to wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that a *demurrer admits all such matters of fact as are sufficiently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States took for its use, by means of separate acts of taking, valuable property of claimant. The first of said separate takings gave the United States temporary control over claimant's property in the Port of New York upon the arising of a national emergency, a declaration of war. The second of said takings, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), gave to the United States the use of said property, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the then existing emergency as were needful, and for the use so acquired and enjoyed for more than a year claimant received no compensation. The third of said takings, under the Act of Congress of March 28, 1918 (40 Stat. 1804/5) vested the title, as well as the possession, of said property in the United States, for which claimant received an award of $2,314,877.00 but not until more than six months after the taking of said title. It is submitted that any of these takings, which, without fault of the claimant or assertion of adverse title by the Government, deprived claimant of the use and possession of its property, under proper legislative authority and executive acts, created an obligation on the part of the Government to make just, full and complete compensation to claimant, said obligation arising under the provisions of the Fifth Amendment to the Consti-

tution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349.
DeCamara v. Brooke, 135 Fed. 384.
U. S. v. Buffalo Pitts Co., 34 S. Ct. 840.
U. S. v. North American Transportation & Trading Co., 40 S. Ct. 519.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38.

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken, provided the taking was duly authorized by the Government and did not sound in tort. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, are, with respect to their effects, two classes of takings: one that without giving compensation deprived appellant of the use and occupation of its real property for a term beginning April 6, 1917, and ending June 28, 1918, and the other that without giving compensation deprived it of the use of $2,314,877.00 for a term beginning June 28, 1918, and ending January 5, 1919. It nowhere appears in the record that the Government was without due authority to deprive appellant of either use of its property, to meet and supply a governmental need or use, it nowhere appears in said record that the Government in either of said takings asserted an adverse claim to said property, against the property rights of appellant, but it does appear that appellant, a citizen or subject of the

United States, was deprived by the Government of the use of appellant's said property, and it appears further in said record that the use and occupation of said real property for the term beginning April 6, 1917, and ending June 28, 1918, was taken by the Government, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), and that the taking of claimant's title to said real property by the Government was pursuant to the authority given in the Act of Congress of March 28, 1918 (40 Stat. 1804/5), and it appears also in said petition that said property, when taken, for the term beginning April 6, 1917, had a per diem rental value estimated at $2,400 and that no compensation has at any time been awarded or paid to appellant by the Government for the use and occupation of said property from April 6, 1917, to June 28, 1918, and although the Government paid claimant $2,314,877.00 as compensation for the title taken on June 28, 1918, the same was not paid over to claimant until January 5, 1919, whereby claimant lost the use of said compensation for more than six months. It is submitted, therefore, that if either the taking of such use and occupation for more than a year before the title to said property was acquired or the withholding of the compensation for more than six months after title was acquired constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to any taking that created an obligation on the part of the Government to make compensation; for by the facts alleged in the petition, in setting up two separate acts or kinds of taking, one pursuant to the provisions of said Act of Congress of August 29, 1916 (39 Stat. 645) and the other pursuant to the provisions of the Act of Congress of March 28, 1918 (40 Stat. 1804/5), said petition presented two statements of facts in the nature of two separate counts, and if one of said counts only is defective, the

Court should have given judgment for the claimant upon the good count.

If a demurrer be too large, that is, if it be pointed to all the counts of the statement of the case, where one of them only is defective, the Court will give judgment upon demurrer for the plaintiff, notwithstanding the defective count—Stephen on Pleading, 145.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

If the Court of Claims had not sustained the demurrer to the petition, so as to have permitted appellant to present testimony in proof of its case, the alleged fact that the Government had taken appellant's property, pursuant to the provisions of the Act of Congress of August 29, 1916 (39 Stat. 645), could have been fully proven by placing in evidence a letter written April 16, 1917, by Newton D. Baker, Secretary of War, to The Depot Quartermaster, New York (through The Quartermaster General) advising that under authority of the Act of Congress of August 29, 1916 (39 Stat. 645), the President directs that The Depot Quartermaster take possession and assume control, for the purposes stated in said Act of Congress, and to utilize the same to the exclusion of all other traffic, of appellant's said property, and directing The Depot Quartermaster to notify the persons in possession of said property, and the owners thereof, if known, of the contents of the order and to furnish them with copies of the same, and appellant could further offer in evidence written notice from The Depot Quartermaster, New York, to appellant, giving said notice.

It is submitted that the Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

II

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

The Court of Claims is a court of limited statutory jurisdiction. In the instant case it is contended that on the facts, as set forth in the appellant's amended petition in the Court of Claims, that the case comes within the jurisdiction of the Court of Claims, both as regards person and subject matter.

The only limitation on the jurisdiction of the Court of Claims with reference to persons as proper party claimants is Section 155 of the Judicial Code. This Section is a re-enactment of Section 1068 R. S. and provides:

> "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

This provision of the Judicial Code raises the question of a claimant's nationality as a jurisdictional consideration. The appellant and claimant herein is a corporation organized and existing under the laws of the State of New Jersey.

Corporate nationality generally is fixed by the country and state of incorporation. In Insurance Company v. Francis (11 Wall. 210), this Court, by Justice Davis, said:

> "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corpora-

tion can have no legal existence outside of the sovereignty by which it was created."

In Shaw v. Quincy Mining Company (145 U. S. 444; 12 S. Ct. 937), appears the following: :

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

As regards the question of corporate nationality, more particularly with reference to jurisdiction of the Court of Claims under the Tucker Act, Judge Rogers, of the Second Circuit, in U. S. v. N. Y. & O. Steamship Company (216 Fed. 61), said:

> "A corporation is a citizen of the country or state by which it was incorporated and it has its residence in such country or state and not elsewhere."

It is clear, therefore, that the appellant corporation is a national of the United States by reason of its incorporation in the State of New Jersey. It is also clear that there is no ground on which the jurisdiction of the Court of Claims could be denied because of the lack of a proper party claimant on the ground of alienage within the meaning of Section 155 of the Judicial Code as set forth above.

It is contended also that the Court of Claims has jurisdiction of the subject matter and character of the claim in the instant case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S.

163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Con-

gress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 12), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C576, decided March 17, 1924, and in said Opinion the Court said:

> "As already stated, the taking of private property for public use by the government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay" (R. 16).

In the United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly ap-

pears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied contract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

III.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 13-19). The legislative basis relied upon in that case upon which to found elements of contractual liability was the Joint Resolution of May 12, 1917 (40 Stat. 75), while in appellant's case the legislative bases upon which to found the elements of contractual liability in the Government taking claimant's property are the Act of Congress of August 29, 1916 (39 Stat. 645), a legislative basis held by the Supreme Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) sufficient to sustain the elements of contractual liability and to give to the Court of Claims jurisdiction to hear and determine the case as founded upon implied contract, and the Act of Congress of March 28, 1918 (40 Stat. 459), which expressly provided for the giving of just compensation. The Court of Claims erred in sus-

taining the demurrer to claimant's petition and dismissing said petition, provided either the taking of the use and occupation of claimant's property by the United States under the Act of Congress of August 29, 1916 (39 Stat. 645), afforded such legislative basis, or if this long delay in giving compensation to claimant after the taking of the title to claimant's property under the Act of Congress of March 28, 1918 (40 Stat. 459) afforded such basis, for the facts alleged in the petition set up two distinct takings, one the use and occupation of appellant's real property and the other the use of the compensation awarded for appellant's title to said property, and in the nature of two counts in said petition appellant sought just compensation for each and/or both of said takings, and, if appellant made out in its said petition a cause of action against the United States within the jurisdiction of the Court of Claims under either of the takings alleged in said petition, the demurrer should have been overruled and appellant's case should have been heard and determined under the good count.

In said Opinion (R. 13-19), to which the Court of Claims makes reference in its Memorandum (R. 12) for its reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the

enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court" (R. 15).

The "Trading With the Enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe either the Act of August 29, 1916 (39 Stat. 645) or the Act of March 28, 1918 (40 Stat. 459) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878, 880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since October 26, 1899, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was real estate, upon which was erected piers, warehouses, sheds, office and other buildings (R. 2). The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could

admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said real estate should not be included with said property, as the Alien Property Custodian had no authority under the "Trading With the enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165), Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading With the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimler Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not be an "enemy" or "ally of enemy" as those terms are used in the "Trading With the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R. 16): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction." Said real estate of appellant in no sense came within the terms and provisions of said Joint Resolution of May 12, 1917 (40 Stat. 75), and said sum of $2,314,877.00, which became due and payable to claimant on June 28, 1918, had no relation to said Joint Resolution.

As appellant was not an *enemy,* being an American corporation, and its property when taken by order of the President was not vessel property, but real estate, to which the Joint Resolution of May 12, 1917, has no application, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffse-Gesellschaft (R. 13 and 19) and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

IV.

The Court of Claims committed error in holding it must be presumed, the Congress having provided for the taking of title to the property and the making of compensation to be determined by the President (40 Stat. 459 and 1914), (1) to have intended that all compensation to which plaintiff was entitled be included in the President's award, or (2) to have meant that no compensation was authorized for the prior use of the property.

The alternative presumptions of Congressional intent indulged by the Court of Claims with reference to compensation for the use of appellant's property prior to taking of title to said property by the United States Government are without foundation and in contravention of the clear wording of the statute.

The fact that the Court of Claims allowed itself to speculate as to Congressional intent to compensate shows that the Court felt itself to be on very uncertain ground. The further fact that the Court indulged itself in alternative and mutually exclusive presumptions of legislative intent, tends to accentuate the evidences of this uncertainty. In reference to the uncertainty incidental to the use of presumptions, the Court, in Western Maryland Railroad Company v. Shivers, 61 Atl. 618, 620; 101 Md. 391, says:

> "A 'presumption' is simply an inference or conclusion logically deduced from known data.' It follows that, when contradictory conclusions are asserted as resulting from the same premises, one or the other or possibly both must be erroneous."

In Rodan v. St. Louis Transit Company, 105 S. W. 1061, 1066, 207 Mo. 392, the Court comments as follows on the basis underlying presumptions:

> "The basic principle upon which presumptions are built is philosophically related to the doctrine of faith.

'Now faith is the substance of things hoped for, the evidence of things not seen.' "

It is contended that the Court of Claims committed error in having recourse to the above mentioned presumptions as to legislative intent to compensate, in view of the clear wording of the statute and its application to the facts of the appellant's case.

On August 29, 1916, the Congress passed an Act (39 Stat. 645), in anticipation of the war situation and providing for the possession and use by the Government of transportation systems in time of public emergency.

Prior to April 6th, 1917, the appellant, as a national of the United States and doing business within the territorial jurisdiction of the United States in accordance with the laws of the State of New Jersey and the United States, was undisturbed in its possession and title to certain lands and premises in the City of Hoboken, Hudson County, and State of New Jersey. On April 6, 1917, the United States, acting by and through the War Department and under the authority given by the Act of Congress of August 29, 1916 (39 Stat. 645), entered and took possession of appellant's property. Soon thereafter, on the 20th day of April, 1917, the Government made its possession and control thereof exclusive by ejecting the appellant from its said lands and premises. The United States, through its duly authorized agents, continued in the use and control of the appellant's lands and premises under the authority of the Act of August 29, 1916 (39 Stat. 645), for more than a year before it acquired appellant's title thereto under the authority given by the Act of March 28, 1918 (40 Stat. 459), which is silent with respect to the taking of said use and control under the earlier Act.

The Act of Congress of March 28, 1918 (40 Stat. 459), making appropriations to supply certain deficiencies in appropriations for the fiscal year ending June 30, 1918, contained the following provisions:

"The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: *Provided,* That if such property cannot be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States."

In pursuance of the authority so given, the President, by a proclamation dated June 28, 1918 (40 Stat. 1804/5) declared that the acquisition of the appellant's terminal equipment and facilities was necessary for the national security and defense and immediately took title to said premises.

On December 3, 1918, the President, still expressly acting under the authority of the Act of March 28, 1918, issued another proclamation (40 Stat. 1914/8) with an attached "Schedule" describing the appellant's property and premises and determining and fixing the just compensation to be paid to appellant for the same in the sum of $2,314,877.00.

From the foregoing brief summary of material facts, it is clear that the appellant was deprived of the actual possession and use of its property under the authority of the Act of August 29, 1916 (39 Stat. 645). It is to be noted, however, that this Act merely authorized the seizure of possession of the appellant's property, still leaving it vested with the title to said property. This situation continued up until June 28, 1918. During this period of more

than a year, the appellant was deprived of the use and occupation of its said property, but continued to hold title to said property. This separation of the possession and the title of the property during said period was recognized by Congress, for Congress, in full knowledge of the possession of the appellant's property by the United States, under the Act of August 29, 1916, passed the Act of March 28, 1918 (40 Stat. 459), authorizing the President to acquire *title* to the appellant's property, under certain conditions.

The section of the Act of March 28, 1918, quoted above, empowered the President to take over title to said property and to make just compensation therefor. The Act also provided that immediately upon the taking over of said property by the President, the *title* to all said property was to immediately vest in the United States. It is important to note that the Act of August 29, 1916, authorized the seizure of the possession of appellant's property and that the Act of March 28, 1918, dealt exclusively with the title to certain designated properties, including the appellant's. As the United States had already been in possession of appellant's property for more than a year prior to the President's proclamation under the Act of March 28, 1918, the only effect of said proclamation was to vest in the United States the title to said property. The President by his proclamation (June 28, 1918), under the limited authority of the Act of March 28, 1918, took over for the United States only the title to the appellant's property and by subsequent proclamation (December 3, 1918), fixed the compensation he was authorized to determine. By the clear and unequivocal wording of said Act of March 28, 1918, such compensation was limited to the expropriation of title under said Act. This statute and the proclamations made pursuant thereto make no reference whatsoever to the prior use of the property by the Government under the authority of the Act of August 29, 1916. There was no necessity that any such reference should be made, as the appellant was already in possession of an ade-

quate remedy for the prior loss of mere possession, since it might file for the taking under the Act of August 29, 1916, its petition in the Court of Claims on the ground of an implied contract within the meaning of Section 145 of the judicial code, thereby recovering the losses it sustained by reason of the use and occupation of the Government prior to the expropriation of the title to its property. That seizures effected under the Act of August 29, 1916, are within the jurisdiction of the Court of Claims on the ground of a contract implied in fact appears from the holding of this Court in the Ducket case, 45 S. Ct., 38. In that case, the claimant filed its petition in the Court of Claims to recover the value of a leasehold interest in a pier, of which it had been deprived by the action of the President under the Act of August 29, 1916. The Court of Claims dismissed the petition for want of jurisdiction. Claimant appealed to this Court, and this Court reversed the judgment of the Court of Claims, saying:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

After an examination of the language of the two statutes, said Acts of August 29, 1916, and March 28, 1918, and the holding of this Court in the Duckett case, it is difficult to escape the conclusion that the said alternative presumptions of the Court of Claims are entirely unfounded.

The first presumption, to the effect that "it (Congress) must be presumed to have intended that all compensation to which plaintiff was entitled be included in the President's Award," finds no basis of support in either one of the statutes. The Act of August 29, 1916, was clearly limited in the scope of its application to the possession and the use

of the property in question. The Act of March 28, 1918, was passed in full contemplation of the then existing situation with reference to the continued occupation and use of said property by the Government, and was clearly limited to the transfer and evaluation of the title to the said property. The *res*, or the subject matter of the taking under the Act of March 28, 1918, was the title to the properties in question, in contradistinction to the use and occupation of said property, which had already been obtained by the Government and used by it for over a year under the Act of August 29, 1916. The taking of the title was conditioned upon "just compensation therefor." It would seem to be clear, therefore, from the unambiguous wording of the Act of March 28, 1918, that the President was empowered merely to make "just compensation" for the *res* taken under said Act, and also that the President was limited to making just compensation for the title to the said property as of June 28, 1918. Any implication that the intent of Congress extended beyond such clearly described *res* finds no basis in fact. Furthermore, there is no sound policy to be satisfied by reading such an intent into the statute.

The alternative presumption, that Congress must be presumed "to have meant that no compensation was authorized for the prior use of the property," is equally without foundation in the wording of the statutes, and is clearly opposed to the holding of this Court in the Duckett case. It is also significant that in the Duckett case this Court, by Mr. Justice Holmes, took occasion to expressly disavow an unwarranted assumption of legislative intent by the Court of Claims. In the Opinion of the Court of Claims in that case, a laborious argument was evolved to support the conclusion that it was not the intent of Congress that the Act of August 29, 1916, should include the taking of a leasehold interest. In this connection, Mr. Justice Holmes, in reversing the Court of Claims both on the point of jurisdiction and that of legislative intent, says: "We can see

no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude claimant."

That Congress meant no compensation was authorized for the prior use of the property cannot be presumed from the silence of the Act of March 28, 1918, with respect thereto. Such silence can raise only the presumption that Congress meant appellant should be compensated for such prior use as others whose property was taken under the Act of August 29, 1916, would be compensated. An intention to confiscate such use can be presumed only when there are words to give rise either expressly or impliedly to such presumption.

Respectfully submitted,

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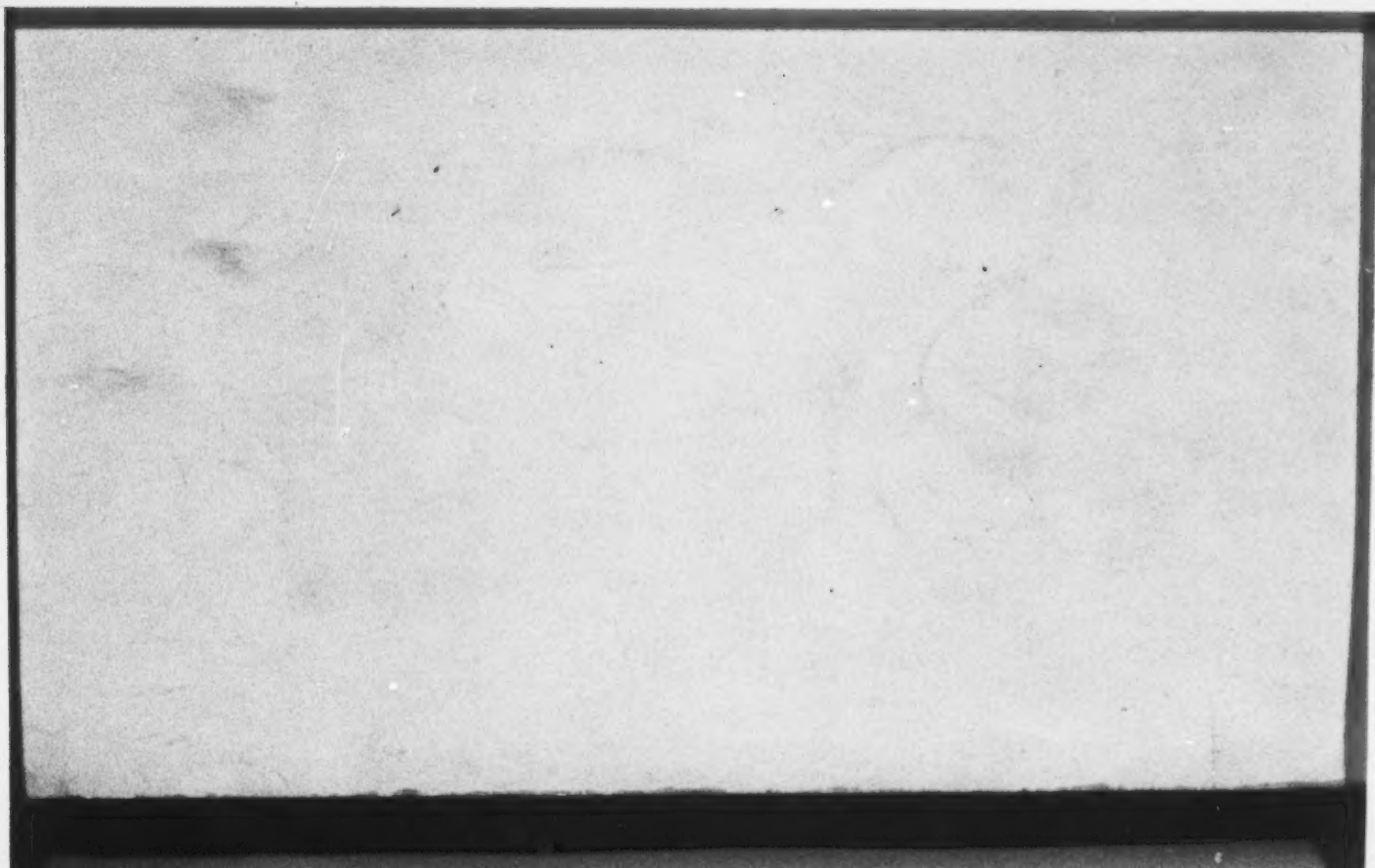
September 4, 1925.



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APPELLANT'S BRIEF

FILED
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WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925

No. 44

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, *Appellant*,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

CHARLES H. LEFEVRE
Appellant's Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 109

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, *Appellant*,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FOREWORD

The Hamburg-American Line Terminal & Navigation Company, the appellant, was incorporated under the laws of the State of New Jersey on October 26, 1899 (R. 1 and 4-10). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Hamburg-American Line Terminal & Navigation Company was beneficially held for said German corporation from October, 1899, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The Alien Property Custodian exercised the rights of stock owner-

ship and elected a Board of Directors for Hamburg-American Line Terminal & Navigation Company to manage and control its affairs (R. 1-2). The Alien Property Custodian seized no money nor other property belonging to the Hamburg-American Line Terminal & Navigation Company, as such money or other property was recognized as belonging to the Corporation and not to its stockholders. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition in this case to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States for its property requisitioned by the United States from appellant, within the six year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code, and, by leave of Court, filed an amended petition in said Court on February 19, 1924 (R. 1).

OPINION DELIVERED IN THE COURT OF CLAIMS

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the amended petition of claimant below, holding that the action sounds in tort, citing Ribas y Hijo v. United States, 194 U. S., 315; Herrera v. United States, 222 U. S., 558; and that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924. Neither said Memorandum nor said Opinion have been officially reported, but both appear in the printed Record (R. 12-19).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 12), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code and the Rules of the Supreme Court.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against the United States in the sum of $184,125.66, with interest (R. 4), and the judgment entered in said Court and apealed from sustained a demurrer to claimant's amended petition and dismissed said petition (R. 12).

Claimant below filed a motion on May 15, 1924, for a new trial, and on May 26, 1924, the Court of Claims filed an order overruling said motion (R. 20). On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, both from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's amended petition on the grounds that the action sounded in tort, and that the Court of Claims was without jurisdiction to hear and determine the case and from the order overruling claimant's motion for a new trial; and, on June 16, 1924, the Court of Claims allowed the appeal (R. 20).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized October 26, 1899 (R. 1 and 4-10) that many years prior to April 6, 1917, by expenditures amounting in the total to $120,659.00, it acquired title to two tug boats (steam screws), a launch (steam screw), a barge, and a coal hoister, all of which floating craft, were constructed in the United States and were at all times used in claimant's business, carried on in the Port of New York,

until on or about the sixth day of April, when they were requisitioned by the Government of the United States (R. 2), acting through United States Customs officials attached to the Treasury Department, that on or about April 17, 1917, the Depot Quartermaster, New York, acting under orders from the Secretary of War, upon direction of the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), took possession and assumed control of said floating craft (R. 3), and said floating craft has ever since remained in the custody of the War Department of the United States of America, without any expressed agreement with claimant concerning the compensation to be paid to claimant for its property so taken for public use, that claimant below founded its claim upon said Act of August 29, 1916, upon the provision of the Constitution of the United States reading "nor shall private property be taken for public use, without just compensation," and/or an implied contract with the Government of the United States arising out of the facts stated in said petition, and that no compensation has been paid to claimant below for its property so taken and used (R. 3 and 4).

Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that the action sounds in tort and that it is without jurisdiction to hear and determine the case (R. 12). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 20), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation

CASE BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from judgments of the Court

of Claims, one (R. 12) entered March 17th, 1924, sustaining a demurrer to claimant's amended petition and dismissing the said petition on the grounds that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition, and another (R. 20) entered May 26, 1924, overruling claimant's motion of May 15, 1924, for a new trial. This case, therefore, comes before the Supreme Court of the United States in practically the same manner as did the case of A. W. Duckett & Co., Inc., v. United States (58 Ct. Cl. 234, 403), which was dismissed April 16, 1923, by the Court of Claims for want of jurisdiction, after findings of fact by the Court of Claims, and with respect to which a motion for a new trial was overruled May 28, 1923, by the Court of Claims upon the same grounds. In dismissing this case for want of jurisdiction, the Court of Claims held that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property acquired by the United States under said Act of August 29, 1916 (39 Stat. 645). From the judgments of the Court of Claims dismissing plaintiff's petition for want of jurisdiction and overruling plaitniff's motion for a new trial, plaintiff was allowed an appeal to the Supreme Court of the United States, where the appeal was heard and decided, the judgment below being reversed, with directions to the Court of Claims to award proper compensation to the appellant (A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38). In the present case, there were no findings of fact, as the dismissal for want of jurisdiction was by a judgment on demurrer, but under the established rules of pleading the facts alleged in claimant's petition were regarded, for the purpose of trying the issue raised by the demurrer, as true, and said facts, concisely stated above, make the present case almost analogous to the case of A. W. Duckett & Co., Inc., other than that claimant in the instant case was the absolute owner of the property taken, while plaintiff in the A. W. Duckett & Co.,

Inc., case held but a leasehold interest in the property taken.

In the case of A. W. Duckett & Co., Inc., Mr. Justice Holmes, among other things, said:

> "The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.
>
> * * * * * * *
>
> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdicton to hear and determine the appeal so brought by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its appeal points of fact and of law quite analogous to those in the case so heard and determined, believes the case of A. W. Duckett & Co., Inc., sustains the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE

Appellant, claimant, below, is a corporation created by and existing under the laws of the State of New Jersey (R. 1; R. 4 and 10), and it has been such since October 26, A. D. 1899 (R. 1). It has its registered office in the State of New Jersey at No. 15 Exchange Place, Jersey City, New Jersey (R. 2). Prior to the matters hereinaftermentioned, it was the owner of certain floating craft, consisting of two tug-boats, a steam-screw launch, a barge, and a coal-hoister, all of which it used in its business carried on in the Port of New York (R. 2). The business there

carried on by it was that of warehousemen and wharfingers (R. 1; R. 5). On or about April 6, 1917, said floating craft had a market, or commercial, value estimated at $184,-124.66 (R. 2), when the United States by the Treasury Department, requisitioned or commandeered all of said floating craft, and later, to-wit: On April 17, A. D. 1917, turned the same over to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having ordered the Depot Quartermaster, New York, to take possession and assume control thereof, and said floating craft have ever since remained in the custody of the War Department of the United States of America (R. 3). Appellant, as claimant below, filed a petition in the Court of Claims of the United States on April 5, 1923 (R. 1), and founded its suit for compensation, for the property so taken and retained, upon said Act of August 29, 1916, and upon the provision contained in the Fifth Amendment to the Constitution of the United States expressed in the words: "nor shall private property be taken for public use, without just compensation," and upon an implied contract arising out of the facts relating to said taking and detention (R. 3). Appellant, claimant below, has at no time been awarded or paid compensation on this claim (R. 4). Appellant is the sole owner of the claim and has not assigned or transferred the same, or any part thereof or interest therein, and appellant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government (R. 4).

To the said petition filed in the Court of Claims of the United States, as aforesaid, the United States, as defendant, filed a demurrer on May 26, 1923 (R. 1). On February 19, 1924, by leave of court, appellant, as claimant or plaintiff below, filed an amended petition (R. 1), and said de-

murrer was allowed to stand to the amended petition (R. 12). The grounds of demurrer were that the petition failed to state a cause of action against the United States (R. 12). On March 17, 1924, the Court of Claims of the United States made an order sustaining the demurrer and dismissing said petition, as amended (R. 12), said Court of Claims holding in a memorandum issued by it that the action sounded in tort and that the Court was without jurisdiction, and made reference to its Opinion in the case of Deutsch-Australische Dampschiffs-Gesellschaft, No. C-576 of said Court, decided March 17, 1924 (R. 12; R. 13 and 19).

On May 15, 1924, appellant, as the claimant or plaintiff below, filed a motion in the Court of Claims of the United States for a new trial, and on May 26, 1924, the Court filed an order overruling said motion (R. 20).

Appellant, as the claimant below, on June 4, 1924, made application for an appeal to the Supreme Court of the United States, both from the judgment rendered on March 17, 1924, and from the order entered May 26, 1924, overruling said motion for a new trial, and on June 16, 1924, said Court of Claims allowed the application for appeal as prayed for (R. 20).

SPECIFICATION OF ERRORS

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

2. The Court of Claims committed error in holding that the action sounds in tort.

3. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

4. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dabpfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

ARGUMENT

I

The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

> "Defandant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States" (R 12).

This demurrer in form and substance is a general demurrer, raising but a single issue, to-wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that *a demurrer admits all such matters of fact as are sufficently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States took for its use, by means of separate acts of taking, valuable property of claimant, without giving any compensation for the property taken, thus leaving claimant to seek just compensation for the property so taken under such provisions of law as the United States has provided in like instances. The first of said separate takings gave the United States temporary police control over claimant's property in the Port of New York upon the arising of a national emergency, a declaration of war. The second of said takings, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), gave to the United States the use of said property, consisting of two tug-boats, a launch, a barge, and a coal hoister for the transfer or

transportation of troops, war material and equipment, or for such other purposes connected with the then existing emergency as were needful. It is submitted that either of these takings, which, without fault of the claimant or assertion of adverse title by the Government, deprived claimant of the use and possession of its property, or its title thereto, under proper legislative authority and executive acts, created an obligation on the part of the Government to make just, full and complete compensation to claimant, said obligation arising under the provisions of the Fifth Amendment to the Constitution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349
DeCamara v. Brooke, 135 Fed. 384.
U. S. v. Buffalo Pitts Co., 34 S. Ct. 840.
U. S. v. North American Transportation and Trading Co., 40 S. Ct. 519.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken, provided the taking was duly authorized by the Government and did not sound in tort. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, deprived appellant of the use and occupation of its property. It nowhere appears in the record that the Government was without due

authority to deprive appellant of the use and occupation of said property, to meet and supply a governmental need or use, it nowhere appears in said record that the Government in either of said takings asserted an adverse claim to said property, against the property rights and title of appellant, but it does appear that appellant, a citizen or subject of the United States, was deprived by the Government of the use and occupation of appellant's said property, and it appears further in said record that the use and occupation of said property was taken by the Government, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), and it appears also in said petition that said property, when taken, had a commercial value estimated at $184,124.66 and that no compensation has at any time been awarded or paid to appellant by the Government for the property so taken. It is submitted, therefore, that if the taking of such use and occupation to said property constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to a taking that created an obligation on the part of the Government to make compensation to appellant.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

It is submitted that the Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

II

The Court of Claims committed error in holding that the claimant's action sounds in tort.

The jurisdiction of the Court of Claims is limited by Section 145 of the Judicial Code so as not to apply to cases sounding in tort. This limitation is founded upon a sound public policy. Commenting on said policy, the Supreme Court by Mr. Justice Brewer, in Schillinger v. United States, 155 U. S. 163, 15 S. Ct. 85, said:

> "Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the Government for mere torts. Some element of contractual liability must lie at the foundation of every action. In Gibbons v. U.S.,8 Wall. 269, 275, it was said: 'The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.' And again, in Morgan v. U. S., 14 Wall. 531, 534: 'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officers of the Government.' "

It is clear, therefore, that this policy, imposed by necessity, is aimed at the protection of the Government *from liability for unauthorized wrongs inflicted by their officers on the citizens.* This public policy, as thus clearly formulated, cannot be made to cover seizures of property expressly authorized by Act of Congress, when the officers making the seizures were acting entirely within their proper legislative authority. No question is raised in the instant case as to the authority of any officer or agent of the United States in the matter of seizures of the ap-

pellant's floating craft. In this case, the appellant, a national of the United States, doing business within the United States, has been divested of its property by reason of the seizure of that property under the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645). There is no question as to the authority of any subordinate officers or agents of the Government in carrying out the President's directions.

It is contended, therefore, that the appellant's case is not an action sounding in tort within the meaning of said jurisdictional limitation, since no question of unauthorized action arises.

Furthermore, it is submitted that the cases cited by the Court of Claims in its Memorandum Opinion (R. 12) are clearly distinguishable from the instant case. Both these cases (*Ribas y. Hijo* case, 194 U. S. 315; and *Herrera* case, 222 U. S. 558) are Spanish-War seizure cases and only incidentally involve the jurisdiction of the Court of Claims under the Tucker Act.

The *Ribas y. Hijo* case (194 U. S. 315) was an action brought by a Spanish corporation to recover from the United States the value of the use of a merchant vessel seized by the United States military forces in Ponce, Porto Rico, at the time of the capture of that place by American military forces.

The *Ribas y. Hijo* case differs from the appellant's case in three important respects:

(1) In the Hijo case the claimant was a Spanish corporation resident in the actual theater of war, and, therefore, clothed with enemy nationality and subject to the disabilities of that status. In the instant case, the claimant is a corporation of the State of New Jersey, and, therefore, clothed with American nationality and entitled to enjoy all its constitutional rights, including all safeguards to its property.

(2) In the Hijo case, the action was brought against the United States to recover the value of the use of a vessel

during the time the vessel was held by the military forces of the United States. In the instant case, the action was brought against the United States to recover the value of the appellant's right, title and interest in its floating craft which were appropriated by the United States under the authority of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645).

(3) In the Hijo case the seizure was effected by military forces of the United States in Ponce, Porto Rico, at the time of its capture by American military forces, when this port was in the actual theater of military operations. In the instant case, the seizure was effected by officers of the United States acting in a civil capacity under due authorization by Congress, and in ports of the United States three thousand miles or more away from the scenes of actual military operations. In the Hijo case, the seizure was clearly a military seizure, carried out under the general discretionary authority vested in military officers. If these officers in the exercise of that authority made any mistake in judgment as to the seizeure, the resulting wrong to the owner of the vessel was then unauthorized and within the jurisdictional limitations referred to above. There was in the Hijo case no special authorization directing the seizure of the vessel nor any participation in the seizure by civil authorities.

Furthermore, it clearly appears from the decision of the Supreme Court that the tort ground was a secondary and incidental ground of decision in the Hijo case. The primary ground of decision was the mutual relinquishment of claims by Spain and the United States under Treaty provisions. This appears in the Opinion of the Court, as follows:

> "We may add that even if the Act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail; for, it is well settled that in case of a conflict between an act of Con-

gress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the Courts."

In the Herrera case (222 U. S. 558), there are also grounds of distinction from the instant case, very similar to those in the Hijo case. The claimant in the Herrera case was a Spanish national resident in the war zone, and, therefore, stamped with the status of an enemy alien. The seizure of the vessel was also a seizure made in the actual theater of military operations by United States military officers acting rightly or wrongly under their general discretionary military authority.

The Supreme Court took the same general position in the Herrera case that it took in the Hijo case; that is, that the seizure was military rather than civil; that, if the military officers of the United States acted rightly within their military authority, there was no ground of claim; if they acted wrongly, the wrong was a tort, since it involved unauthorized action by an officer of the Government, and there could be no claim within the jurisdiction of the Court of Claims, and that, in any event, the claim was disposed of under the Treaty of Peace through the mutual relinquishment of claims by the belligerents on behalf of their respective nationals. With reference to these points, Mr. Justice McKenna, in delivering the opinion of the Court, said:

"We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemies' property, and subject to seizure, confiscation, and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies

of the government, and of the citizens or subjects of the other."

* * * * * * *

"We are then brought to consider the quality of the act of the officers of the Army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation, if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in J. Ribas y Hijo v. United States, and Juragua Iron Co. v. United States. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract, and the action is one of which the Court of Claims could not take jurisdiction, whatever other redress is open to claimants."

It is clear, therefore, that in both of the above mentioned cases, cited by the Court of Claims in support of its holding that the instant case sounds in tort, the tort ground was really a secondary consideration in the decision, there being more important war and treaty questions involved. Moreover, even though the tort ground had been the principal ground of the decision, the cases cited by the Court of Claims are readily distinguishable from the instant case. While the cited cases rest upon grounds which bring them clearly within the statutory policy underlying the tort jurisdictional limitation as set forth in the Tucker Act, yet such grounds do not appear in the instant case. The instant case involves no question of unauthorized action by Government officers and no question of losses suffered by an enemy alien within the war zone. It does involve, however, a taking of the claimant's floating craft as authorized by Congress under circumstances that afford a basis for the implication of a contract.

It is submitted that the cases this Court has decided purely on the tort ground are within the underlying statu-

tory policy of protecting the Government from liability for the unauthorized action of its officers and agents and that they, therefore, have no bearing on the instant case.

III

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

The Court of Claims is a court of limited statutory jurisdiction. In the instant case, it is contended that on the facts, as set forth in the appellant's amended petition in the Court of Claims, the case comes within the jurisdiction of the Court of Claims, both as regards person and subject matter.

The only limitation on the jurisdiction of the Court of Claims with reference to persons, as proper party claimants, is Section 155 of the Judicial Code. This Section is a re-enactment of Section 1068 R. S. and provides:

> "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

This provision of the Judicial Code raises the question of a claimant's nationality as a jurisdictional consideration. The appellant and claimant herein is a corporation organized and existing under the laws of the State of New Jersey.

Corporate nationality generally is fixed by the country and state of incorporation. In Insurance Company v. Francis (11 Wall. 210), this Court, by Justice Davis, said:

> "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created."

In Shaw v. Quincy Mining Company (145 U. S. 444; 12 S. Ct. 937), appears the following:

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

As regards the question of corporate nationality, more particularly with reference to the jurisdiction of the Court of Claims under the Tucker Act, Judge Rogers, of the Second Circuit, in U. S. v. N. Y. & O. Steamship Company (216 Fed. 61), said:

> "A corporation is a citizen of the country or state by which it was incorporated and it has its residence in such country or state and not elsewhere."

It is clear, therefore, that the appellant corporation is a national of the United States by reason of its incorporation in the State of New Jersey. It is also clear that there is no ground on which the jurisdiction of the Court of Claims could be denied because of the lack of a proper party claimant on the ground of alienage within the meaning of Section 155 of the Judicial Code as set forth above.

It is contended also that the Court of Claims has jurisdiction of the subject matter and character of the claim in the instant case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S. 163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up

to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages,

> liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."
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> 2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 12), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and in said Opinion the Court said: :

> "As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay." (R. 16.)

In United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly appears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied

contract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

IV.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 13-19). The legislative basis relied upon in that case upon which to found elements of contractual liability was said Joint Resolution of May 12, 1917 (40 Stat. 75) only, while in appellant's case the legislative basis upon which to found the elements of contractual liability in the Government taking claimant's property is the Act of Congress of August 29, 1916 (39 Stat. 645), a legislative basis held by the Supreme Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) sufficient to sustain the elements of contractual liability and to give to the Court of Claims jurisdiction to hear and determine the case as founded upon implied contract.

In said opinion, to which the Court of Claims makes reference in its Memorandum (R. 12) for its reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

"It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court" (R. 15).

The "Trading With the Enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe said Act of August 29, 1916 (39 Stat. 645) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878,880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its

subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since October 26, 1899, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was floating craft consisting of two tug-boats, a launch, a barge, and a coal hoister, all of which were built in the United States and documented under the laws of the United States at New York, and said craft were used in claimant's business, carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States (R. 3). The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said floating craft of claimant should not be included with said property, as the Alien Property Custodian had no authority under the "Trading With the Enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165) Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading With the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimler Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' inter-

> ests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not an "enemy" or "ally of enemy" as those terms are used in the "Trading with the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R.

16): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction."

As appellant was not an *enemy*, being an American corporation, and its property when taken by order of the President was not *enemy* property, but was documented under the laws of the United States, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffs-Gesellschaft (R. 12-19) and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

Are not, therefore, the words of Mr. Justice Holmes, as used in the opinion of this Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) applicable with peculiar force to appellant's case:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims."

Respectfully submitted,

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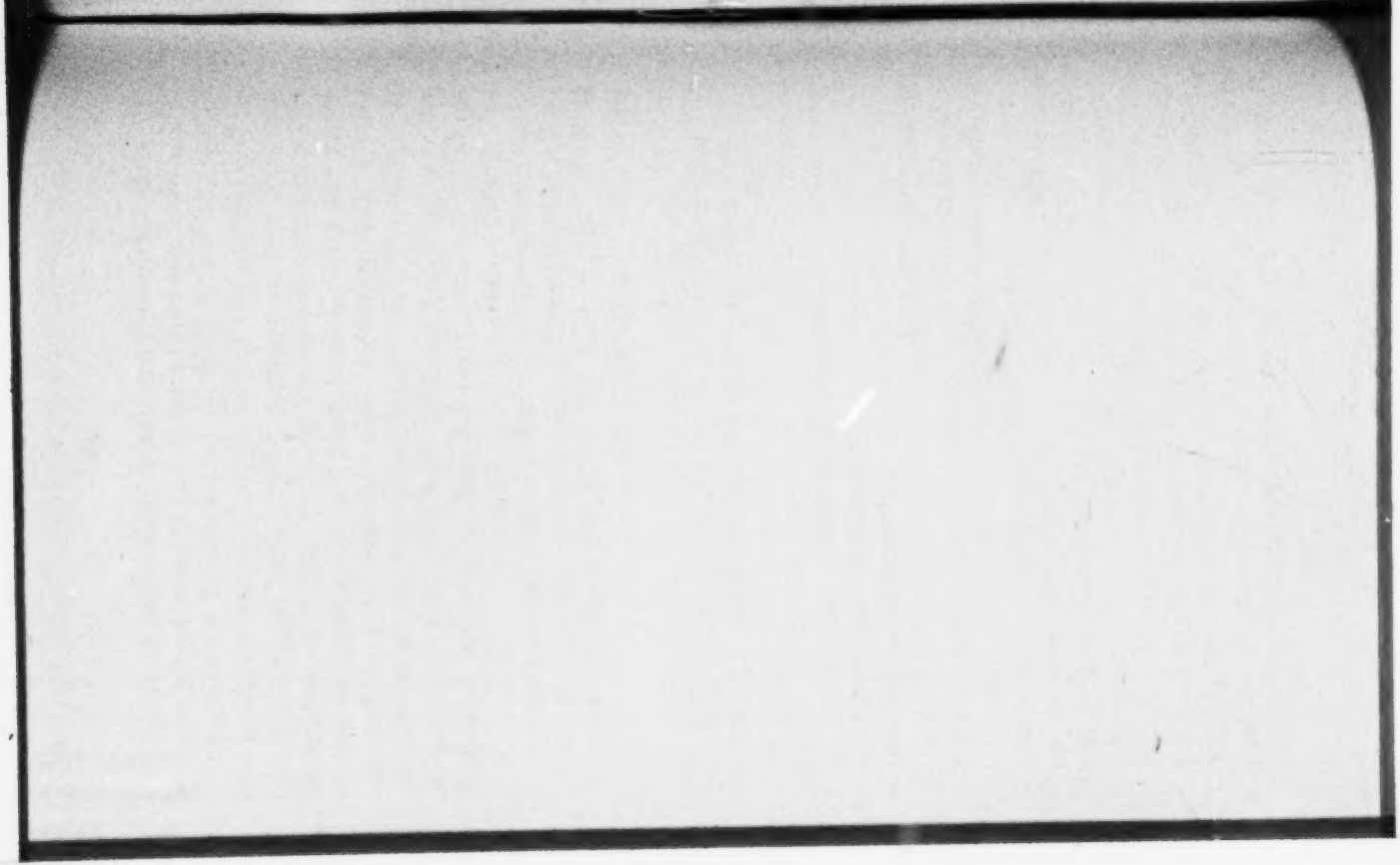
Washington, D. C.
September 4, 1925.



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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Original No. 4
IN EQUITY.

STATE OF NEVADA, *Complainant*,

v.

CROWN WILLAMETTE PAPER COMPANY, a Corporation organized and existing under and by virtue of the laws of the State of Maine, *Defendant*.

STIPULATION.

M. A. DISKIN,
Attorney-General of Nevada,
Attorney for Complainant.

FRANK H. NORCROSS,
OSCAR SUTRO,
W. H. ORRICK,
Attorneys for Defendant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

Original No. 30

IN EQUITY.

STATE OF NEVADA, *Complainant*,

v.

CROWN WILLAMETTE PAPER COMPANY, a Corporation organized and existing under and by virtue of the laws of the State of Maine, *Defendant*.

STIPULATION.

WHEREAS, The above-entitled action was instituted by the State of Nevada in the above-entitled Court on the 15th day of February, 1918, praying for a permanent injunction prohibiting the above-named defendant from depositing certain alleged deleterious liquids and substances in the Truckee River (an interstate stream flowing from the state of California into the State of Nevada) to the injury of the State of Nevada and particularly of the domestic water supply of the cities of Reno and Sparks and other munici-

palities within the State of Nevada, and injurious to the fish life of said stream; and

WHEREAS, The defendant is the owner of, and operates a sulphite pulp and paper mill on or near said river situated at Floriston, California, and it is claimed by complainant that prior to the institution of said suit a predecessor in interest of defendant had been depositing into said river from the operations of its said plant certain particles of wood fibre or pulp and certain quantities of spent sulphite cooking liquor used in its process of manufacture of paper, which by the natural flow of said river reached the sources of supply of water for municipal purposes of said cities of Reno and Sparks, and, also, as claimed by the complainant, affected the fish life in said river within both the State of California and the State of Nevada; and

WHEREAS, In order to avoid any objection upon the part of complainant, defendant or its said predecessor in interest constructed a pumping device designed to, and which did, pump said liquor to certain bench land beyond said river channel; that said pumping device was at said time and for some years thereafter considered to be a solution of the controversy between said parties, but it is claimed by complainant that in the course of time a portion of said liquor so pumped to said bench land began gradually to seep through the earth, rock, and soil, and that a portion thereof, in a somewhat changed form, was returned to the river channel; and

WHEREAS, Defendant or said predecessor in interest of defendant thereupon caused to be constructed within its said plant at Floriston a device for evaporating the said liquor and burning the residue thereof with other fuels used in the defendant's processes for

the manufacture of paper, but that said evaporating device proved to be unsatisfactory; and various other devices and methods for the purpose aforesaid have been installed and tested by defendant, none of which have been found to be entirely satisfactory to the parties hereto; and

WHEREAS, The total investment of defendant in connection with said plant amounts to approximately three million ($3,000,000) dollars; and

WHEREAS, The defendant corporation has expended in said pumping, evaporating, and other devices, in order to obviate any objections upon the part of complainant, whether substantial or otherwise, approximately three hundred thousand ($300,000) dollars; and

WHEREAS, Defendant on July, 1926, had on hand, at or near said plant, forty-five thousand (45,000) cords of cut fir wood designed for manufacture into pulp and paper and representing an investment of an amount claimed by the defendant to exceed or closely approximate three hundred thousand ($300,000) dollars, and which investment would be largely lost to the defendant if it did not continue to operate said sulphite mill; and

WHEREAS, The Forest Products Laboratory of the United States Forest Service is engaged in making experiments for the purpose of ascertaining the most effective method of disposing of the sulphite waste liquor resulting from the operations of sulphite mills, and extensive investigations to the same end are now being conducted by various states, associations, and corporations, and it is anticipated that effective methods for the purpose aforesaid will be discovered through such investigations; and

WHEREAS, For the parties hereto to prepare evidence for presentation to the court upon the issues involved in this suit would require the expenditure of large sums of money, both upon the part of complainant and defendant, which expenditure would, or might be, of no substantial benefit to the parties; now, therefore,

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action, subject to the approval of the Supreme Court of the United States, as follows:

I.

That, pending the submission and final determination of this cause and at all times after the date hereof, the defendant will install and hereafter maintain and operate a sufficient number of filters and screens as will prevent wood pulp and fibre from entering said river in Nevada.

II.

That defendant will make all reasonable efforts to find a satisfactory method of disposing of said spent sulphite cooking liquor, and will prosecute with dispatch researches for that purpose; and that complainant will cooperate and suggest to defendant for adoption any feasible method which may be discovered or ascertained by it.

III.

That, subject to the conditions hereinafter set forth, said court shall, at the call of the calendar of the October Term, 1929, enter an order granting to complainant

herein a perpetual injunction against defendant operating said sulphite mill, in such form and containing such provisions as shall be deemed proper by said court. That, for the purpose of assisting the court in determining the provisions to be inserted in the decree in said cause, the parties shall endeavor to agree upon the form of such decree and, failing such agreement, complainant shall, within sixty (60) days next prior to October 1, 1929, serve upon defendant a copy of the form of decree proposed by it; that defendant, within thirty (30) days after the service upon it of the form of decree proposed by complainant, shall serve upon complainant a copy of the form of decree proposed by defendant. During the period of six (6) months next prior to June 1, 1929, complainant and defendant, or either of them, may take testimony before the Master appointed heretofore by said court, or some other Master appointed by it, upon due notice, for the purpose of determining the provisions which should be inserted in said decree. That said form of decree agreed upon by said parties, or, in the event of their failure or inability to agree thereon, said proposed form of decree prepared and served upon defendant by complainant and said proposed form of decree prepared and served upon complainant by defendant, together with the testimony so taken, shall be submitted to said court; and that, from the testimony so submitted, said court shall determine the provisions to be inserted in said decree.

IV.

Notwithstanding anything to the contrary contained herein, it is agreed that, if on October 1, 1929, either of the following conditions shall exist, to wit:

(1) A new or different method for the disposal of the spent sulphite cooking liquor from said sulphite mill from that now employed shall have been discovered or ascertained by either of the parties hereto or by any of the agencies hereinbefore mentioned and shall have been installed and put in operation six months prior to October 1, 1929, which method shall receive the approval of complainant or its agents as being effective to prevent pollution of said river in Nevada from liquor from said sulphite mill, and such approval shall be signified by memorandum in writing filed with the Clerk of the Supreme Court of the United States prior to October 1, 1929; provided that, in the event the complainant or its agents shall disapprove the method or methods adopted by the defendant for the disposal of said spent sulphite cooking liquor, notice of such disapproval shall be served upon defendant in writing within thirty (30) days after notice from the defendant to complainant of the installation of such new or different method, and, provided, however, that, in the event defendant shall have reasonable cause to believe that the determination of complainant to its agents is not in accordance with the facts, said method shall, upon demand of defendant, be submitted for approval to a committee of three arbitrators, one to be selected by complainant and one to be selected by defendant, and these two to select the third one, and, in the event they are unable to agree upon such third arbitrator the same to be selected by any of the following in the order named, to wit; the Chief Justice or any Associate Justice of the Supreme Court of the United States, or the presiding Justice or any Justice of the United States Circuit Court of Appeals for the Ninth Circuit, or the Chief Engineer of the United

State Forest Service, or the District Engineer of Forest Service, District Five, United States Department of Agriculture, or the District Engineer of Forest Service, District Four, United States Department of Agriculture; the officer to make such selection to be agreed upon by the parties hereto, or failing such agreement, application for such selection to be made to said officers in the order named, and that such determination so made by a majority of said board of arbitrators, signifying their approval of such method, shall be filed with the Clerk of the Supreme Court of the United States prior to October 1, 1929; or

(2) Said sulphite mill shall be dismantled and proof of such dismantling shall be established by defendant by satisfactory evidence and filed with the Clerk of the United States Supreme Court prior to September 15, 1929; provided, that (unless by consent in writing complainant agrees to some other form of dismantling) it shall be deemed sufficient proof of such dismantling if it is established that the following vital and necessary parts to the operation of such sulphite mill have been removed therefrom, to wit: the ovens, burners, and gas fans, and that they will not be replaced or other substitutes installed therein except by consent of complainant or upon order of court;

Then, and in either of said events, said injunction shall not be issued.

It is further stipulated and agreed that any decree of injunction so entered shall contain a clause authorizing the Supreme Court of the United States, upon proper showing, at any time thereafter, to modify the terms of said decree in accordance with the proofs presented.

It is further stipulated that, if the Supreme Court

of the United States refuses, upon grounds not involving the merits of the application, to make any order for the replacement of parts removed from said mill, then the determination of the question as to whether such replacements may be made and the operations of said sulphite mill resumed shall be decided by arbitrators appointed and acting pursuant to the provisions contained in paragraph (1) hereof.

IV-a.

It is further stipulated, and defendant agrees, that when and if an efficient method or process is discovered and installed by defendant for the treatment of the spent sulphite cooking liquors, that defendant will at all times thereafter while said sulphite mill is in operation maintain and operate such process for treating said spent sulphite cooking liquors; and if, at any time, said process for any reason shall fail to operate, that for said period of time defendant will discontinue operations of said sulphite department of said mill until such time as said process is repaired and will efficiently treat said spent sulphite cooking liquors.

V.

Nothing herein contained shall be deemed an admission by defendant that its operations, or those of its predecessors in interest, have polluted said river or now pollute the same, nor that complainant has at any time or at all consented to any act upon the part of defendant in respect to defendant's discharging of pulp fibre or sulphite cooking liquor into said stream.

VI.

In view of the foregoing, the parties hereto stipulate that said cause may be continued to the October Term, 1929, and then submitted for final determination by the Court according to this stipulation.

WHEREFORE, it is respectfully requested that the Court order such continuance.

Dated: September 21st, A. D. 1927.

M. A. DISKIN,
Attorney-General of the State of Nevada.

OSCAR SUTRO,
W. H. ORRICK,
FRANK H. NORCROSS,
Attorneys for Defendant.

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APPELLANT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

No. [redacted] 115 45.5

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

CHARLES H. LEFEVRE,
Appellant's Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 477.

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FOREWORD.

The Atlas Line Steamship Company, the appellant, was incorporated under the laws of the State of New Jersey on June 23, 1903 (R. 4-9). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Atlas Line Steamship Company was beneficially held for said German corporation from June, 1903, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The Alien Property Custodian exercised the rights of stock ownership and elected a Board of Directors for Atlas Line Steamship Company to manage and control its affairs (R. 1-2). The Alien Property Custodian seized no money nor other property belonging to the Atlas Line Steamship Company, as such money or other property was recognized as belong-

ing to the Corporation and not to its stockholders. Through the Board of Directors, elected by the vote of said Alien Property Custodian, property of the Corporation was sold, including premises at 45 Broadway, New York City, which brought $2,000,000, and the proceeds of said sales are held in the treasury of the Corporation. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States for its property requisitioned by the United States from appellant, within the six year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code.

OPINION DELIVERED IN THE COURT OF CLAIMS.

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the amended petition of claimant below, holding that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924. Neither said Memorandum nor said Opinion have been officially reported, but both appear in the printed Record (R. 12-19).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 12), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against

the United States in the sum of $14,250.00, with interest (R. 3), and the judgment entered in said Court and appealed from sustained a demurrer and dismissed said petition (R. 12).

Claimant below filed a motion on May 15, 1924, for a new trial, and on May 26, 1924, the Court of Claims filed an order overruling said motion (R. 19). On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, both from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's petition on the grounds that the Court of Claims was without jurisdiction to hear and determine the case and from the order overruling claimant's motion for a new trial; and, on June 15, 1924, the Court of Claims allowed the appeal (R. 19).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized on June 23, 1903 (R. 1), that in the year 1913 it purchased three barges for $17,500.00, all of which barges it caused to be documented under the laws of the United States at New York on March 1, 1913, that said barges were used in its business carried on in the Port of New York until on or about the 6th day of April, 1917, when the commercial value of said barges was $14,250.00 and they were requisitioned by the Government of the United States (R. 2), that on or about April 16, 1917, The Depot Quartermaster, New York, acting under orders from the Secretary of War, upon direction of the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), took possession and assumed control of said barges (R. 2), that said barges, listed as "lighters," are included in the Executive Order made June 30, 1917 (R. 9-11), pursuant to the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), and title to said barges was taken by the United States, through the United States Shipping Board (R. 2), that claimant below founded its claim

upon said Act of August 29, 1916, upon the provision of the Constitution of the United States reading "nor shall private property be taken for public use, without just compensation," said Joint Resolution and/or an implied contract with the Government of the United States arising out of the facts stated in said petition (R. 3), and that no compensation has been paid to claimant below for its property so taken and used (R. 3). Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that it is without jurisdiction to hear and determine the case (R. 12). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 19), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation.

CASE BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from judgments of the Court of Claims, one (R. 12) entered March 17th, 1924, sustaining a demurrer to claimant's petition and dismissing the said petition on the grounds that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition, and another (R. 19) entered May 26, 1924, overruling claimant's motion of May 15, 1924, for a new trial. This case, therefore, comes before the Supreme Court of the United States in practically the same manner as did the case of A. W. Duckett & Co., Inc., v. United States (58 Ct. Cl. 234, 403), which was dismissed April 16, 1923, by the Court of Claims for want of jurisdiction, after findings of fact by the Court of Claims, and with respect to which a motion for a new trial was overruled May 28, 1923, by the Court of Claims upon the same grounds. In dismissing

this case for want of jurisdiction, the Court of Claims held that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property acquired by the United States under said Act of August 29, 1916 (39 Stat. 645). From the judgments of the Court of Claims dismissing plaintiff's petition for want of jurisdiction and overruling plaintiff's motion for a new trial, plaintiff was allowed an appeal to the Supreme Court of the United States, where the appeal was heard and decided, the judgment below being reversed, with directions to the Court of Claims to award proper compensation to the appellant (45 S. Ct. 38). In the present case, there were no findings of fact, as the dismissal for want of jurisdiction was by a judgment on demurrer, but under the established rules of pleading the facts alleged in claimant's petition were regarded, for the purpose of trying the issue raised by the demurrer, as true, and said facts, concisely stated above, make the present case almost analogous to the case of A. W. Duckett & Co., Inc., other than that claimant in the instant case was the absolute owner of the property taken, while plaintiff in the A. W. Duckett & Co., Inc., case held but a leasehold interest in the property taken.

In the case of A. W. Duckett & Co., Inc., Mr. Justice Holmes, among other things, said:

> "The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.
>
> * * * * * * *
>
> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdiction to hear and determine the appeal so brought by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its appeal points of fact and of law quite analogous to those in the case so heard and determined, believes the case of A. W. Duckett & Co., Inc., sustains the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE.

Suit was instituted in the Court of Claims of the United States on April 5, 1923 (R. 1), by appellant, claimant below, filing in said Court a petition alleging, among other things, the following pertinent facts:

1. That Atlas Line Steamship Company, the claimant, is a corporation created by and existing under the laws of the State of New Jersey, organized on the 23rd day of June, A. D. 1903 (R. 1).

2. That in the year A. D. 1913, said corporation at a cost, or expenditure, of $17,500.00, acquired title to and became the owner of three barges named the "ARNI" (Official Number 29998), the "ARGOS" (Official Number 30060), and the "AROA" (Official Number 30062), respectively, all of which were documented under the laws of the United States, at New York, on March 1, 1913, under Permanent Enrollment Numbers 465, 466 and 467, respectively, and said barges were used in claimant's business carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States, as hereinafter mentioned, when said barges had a market or commercial value estimated at $14,250.00, apportioned as follows:

"ARNI" $3,000.00
"ARGOS" $6,450.00
"AROA" ..... $4,800.00 (R. 2)

3. That on or about the sixth day of April, A. D. 1917, in the Port of New York, City and State of New York, the United States of America by the Treasury Department, acting through customs officials, requisitioned said barges, and soon thereafter said barges were transferred to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having, on April 16, 1917, ordered The Depot Quartermaster, New York, to take possession and assume control thereof (R. 2).

4. That all of said barges, listed as "lighters," are included in an Executive Order made on the thirtieth day of June, 1917 (R. 9-11), and pursuant to said Executive Order and the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), the possession and title of the aforementioned barges were taken over to the United States, by and through the United States Shipping Board (R. 2).

5. That claimant, as the sole owner of the claim set forth in said petition, and not having assigned or transferred said claim or any part thereof or interest therein, and having at all times borne true allegiance to the Government of the United States, reading into the authority under which its property was so taken, the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founds its claim, for which said suit was brought, upon said provision of the Constitution of the United States, said Act of August 29, 1916, and upon said Joint Resolution, and/or an implied contract with the Government of the United States, arising out of the facts and warranting the inference of an agreement on the part of the said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has

been deprived of the use of its property, or for the time of the withholding of said price from claimant since the claim first accrued, no compensation having at any time been awarded or paid to claimant by the Government of the United States on said claim (R. 3).

6. That claimant brought no suit on this claim, other than the said suit in the Court of Claims, against the Government of the United States or anyone acting for it (R. 3).

On May 26, 1923, the defendant filed a demurrer to said petition (R. 1), the demurrer being worded, as follows:

> "Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States." (R. 11.)

On March 17, 1924, the Court of Claims entered an order, as follows:

> "This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, It is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is sustained, and the amended petition is dismissed." (R. 12.)

SPECIFICATION OF ERRORS.

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

2. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

3. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

ARGUMENT.

I.

The Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

> "Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States" (R. 11).

This demurrer in form and substance is a general demurrer, raising but a single issue, to wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that *a demurrer admits all such matters of fact as are sufficiently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States took for its use, by means of three separate acts of taking, valuable property of claimant, without giving any compensation for the property taken, thus leaving claimant to seek just compensation for the property so taken under such provisions of law as the United States has provided in like instances. The first of said three separate takings gave the United States temporary police control over claimant's property in the Port of New York upon the arising of a national emergency, a declaration of war. The second of said takings, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), gave to the United States the use of said property, the barges "ARNI," "ARGOS" and "AROA," for the transfer or transportation of troops, war

material and equipment, or for such other purposes connected with the then existing emergency as were needful. The third of said takings, under the Joint Resolution of May 12, 1917 (40 Stat. 75) vested the title, as well as the possession, of said barges in the United States. It is submitted that any of these takings, which, without fault of the claimant or assertion of adverse title by the Government, deprived claimant of the use and possession of its property, or its title thereto, under proper legislative authority, created an obligation on the part of the Government to make just compensation to claimant, said obligation arising under the provisions of the Fifth Amendment to the Constitution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349.
DeCamara v. Brooke, 135 Fed. 384.
U. S. v. Buffalo Pitts Co., 34 S. Ct. 840.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken, provided the taking was duly authorized by the Government and did not sound in tort. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, are, with respect to their effects, two classes of takings: one that deprived appellant of the use and occupation of its property, and the other that deprived it of the title to its said property. It nowhere appears in the record that the Government was without due

authority to deprive appellant of either the use and occupation of said property or the title to said property, to meet and supply a governmental need or use, it nowhere appears in said record that the Government in any of said takings asserted an adverse claim to said property, against the property rights and title of appellant, but it does appear that appellant, a citizen or subject of the United States, was deprived by the Government of both the use and occupation of appellant's said property and of appellant's title thereto, and it appears further in said record that the use and occupation of said property was taken by the Government, pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), and that the taking of claimant's title to said property by the Government was pursuant to the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), and it appears also in said petition that said property, when taken, had a commercial value estimated at $14,250.00 and that no compensation has at any time been awarded or paid to appellant by the Government for the property so taken. It is submitted, therefore, that if the taking of either such use and occupation or the title to said property constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to any taking that created an obligation on the part of the Government to make compensation; for by the facts alleged in the petition, in setting up two separate acts or kinds of taking, one pursuant to the provisions of said Act of Congress of August 29, 1916 (39 Stat. 645) and the other pursuant to the provisions of the Joint Resolution of May 12, 1917 (40 Stat. 75), said petition presented two statements of facts in the nature of two separate counts, and if one of said counts only is defective, the Court should have given judgment for the claimant upon the good count.

If a demurrer be too large, that is, if it be pointed to all

the counts of the statement of the case, where one of them only is defective, the Court will give judgment upon demurrer for the plaintiff, notwithstanding the defective count—Stephen on Pleading, 145.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

If the Court of Claims had not sustained the demurrer to the petition, so as to have permitted appellant to present testimony in proof of its case, the alleged fact that the Government had taken appellant's property, pursuant to the provisions of the Act of Congress of August 29, 1916 (39 Stat. 645), could have been fully proven by placing in evidence a letter written April 16, 1917, by Newton D. Baker, Secretary of War, to The Depot Quartermaster, New York (through The Quartermaster General) advising that under authority of the Act of Congress of August 29, 1916 (39 Stat. 645), the President directs that The Depot Quartermaster take possession and assume control, for the purposes stated in said Act of Congress, and to utilize the same to the exclusion of all other traffic, of appellant's said property, and directing The Depot Quartermaster to notify the persons in possession of said property, and the owners thereof, if known, of the contents of the order and to furnish them with copies of the same, and appellant could further offer in evidence written notice from The Depot Quartermaster, New York, to appellant, giving said notice.

It is submitted that the Court of Claims committed error in sustaining defendant's demurrer to claimant's amended petition and dismissing said petition.

II.

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S. 163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court

of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."
>
> 2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 12), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and in said Opinion the Court said:

> "As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay." (R. 15.)

In United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

"When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly appears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied contract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

III.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 12-19). The legislative basis relied upon in that case upon which to found elements of contractual liability was said Joint Resolution of May 12, 1917 (40 Stat. 75) only, while in appellant's case there is a further legislative basis upon which to found the elements of contractual liability in the Government taking claimant's property under the Act of Congress of August 29, 1916 (39 Stat. 645), a legislative basis held by the Supreme Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) sufficient to sustain the elements of

contractual liability and to give to the Court of Claims jurisdiction to hear and determine the case as founded upon implied contract. Even if the said Joint Resolution (40 Stat. 75) afforded appellant no legislative basis upon which to found the elements of contractual liability to sustain an implied contract within the jurisdiction of the Court of Claims to hear and determine, and to award just compensation to appellant for its title to its three barges which passed to the United States in the execution of the Executive Order made June 30, 1917 (R. 9-11), the Court of Claims erred in sustaining the demurrer to claimant's petition and dismissing said petition, provided the taking of the use and occupation of said three barges by the United States under the Act of Congress of August 29, 1916 (39 Stat. 645), afforded such legislative basis, for the facts alleged in the petition set up two distinct takings, one the use and occupation of appellant's vessel property and the other appellant's title to said property, and in the nature of two counts in said petition appellant sought just compensation for each and/or both of said takings, and, if appellant made out in its said petition a cause of action against the United States within the jurisdiction of the Court of Claims under either of the takings alleged in said petition, the demurrer should have been overruled and appellant's case should have been heard and determined under the good count.

In said Opinion, to which the Court of Claims makes reference in its Memorandum (R. 12) for its reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See

Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court." (R. 14-15).

The "Trading with the enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe said Joint Resolution (40 Stat. 75) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878, 880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since June 23, 1903, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was vessel property, consisting of three barges, named the "ARNI" (Official Number, 29998), the "ARGOS" (Official Number, 30060),

and the "AROA" (Official Number, 30062), all of which were documented under the laws of the United States, at New York, on March 1, 1913, under Permanent Enrollment Numbers 465, 466 and 467, respectively, and said barges were used in claimant's business, carried on in the Port of New York, State of New York, until same were requisitioned by the Government of the United States (R. 2). The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said three barges of claimant should not be included with said property, as the Alien Property Custodian had no authority under the "Trading with the enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165), Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimer Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized

the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not be an "enemy" or "ally of enemy" as those terms are used in the "Trading with the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R. 15): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction." Said vessel property of appellant came within the terms and provisions of said Joint Resolution of May 12, 1917 (40 Stat. 75) only in that prior to appellant taking title to said vessels in 1913 they were owned by the Hamburg-American Line, a German corporation, and had German register. If said Joint Resolution was intended as a war measure for

the *capture* of enemy property, and was not intended as an authorization act for the *taking* of property under the right of eminent domain which would carry compensation to the owner, and made no adequate provision either for the return of the property to its proper owner or for the giving of just compensation to said owner if non-enemy property was taken thereunder by mistake, said Joint Resolution, when applied to non-enemy property, would be in contravention of the Constitutional rights of the non-enemy owner not to be deprived of life, liberty or property, without due process of law, and not to have his private property taken without just compensation, as to create an obligation on the part of the Government to compensate such owner and a Constitutional basis on which to found a claim upon implied contract within the statutory jurisdiction of the Court of Claims to hear and determine.

As appellant was not an *enemy*, being an American corporation, and its property when taken by order of the President was not *enemy* property, but was documented under the laws of the United States, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffs-Gesellschaft (R. 12-19) and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

Not only is appellant an American corporation, and not only were its vessels with American documentation questionably within the scope of said Joint Resolution (40 Stat. 75), but said vessels were already in the possession and use of the United States when the President made the order (R. 9-11) on June 30, 1917, directing the possession and title of said vessels to be taken over to the United States through the United States Shipping Board, as the Secretary of War, upon directions from the President, ordered on April 16, 1917, said vessels transferred to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service (R. 2), pursuant to the provisions of the Act of Congress of August 29, 1916, c. 418, sec. 1) (39 Stat. 645). Are

not, therefore, the words of Mr. Justice Holmes, as used in the opinion of this Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38) applicable with peculiar force to appellant's case:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims."

Respectfully submitted,

CHARLES H. LEFEVRE,
Attorney for Appellant.

402-3-4 Hibbs Building,
Washington, D. C.
September 4, 1925.

FILE COPY

APPELLANT'S BRIEF.

OCT 9 19
WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 46.

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

CHARLES H. LEFEVRE,
Appellant's Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 111.

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FOREWORD.

The Atlas Line Steamship Company, the appellant, was incorporated under the laws of the State of New Jersey on June 23, 1903 (R. 1 and 4-9). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Atlas Line Steamship Company was beneficially held for said German corporation from June, 1903, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The Alien Property Custodian exercised the rights of stock ownership and elected a Board of Directors for Atlas Line Steamship Company to manage and control its affairs (R. 1). The Alien Property Custodian seized no money nor other property belonging to the Atlas Line Steamship Company, as such money or other property was recognized as belong-

ing to the Corporation and not to its stockholders. Through the Board of Directors, elected by the vote of said Alien Property Custodian, property of the Corporation was sold, including premises at 45 Broadway, New York City, which brought $2,000,000, and the proceeds of said sales are held in the treasury of the Corporation. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition in this case to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States, for its property requisitioned by the United States from appellant, within the six year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code.

OPINION DELIVERED IN THE COURT OF CLAIMS.

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the petition of claimant below, holding that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to Ribas y Hijo, 194 U. S. 315; Herrera Case, 222 U. S. 558, and to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924. Neither said Memorandum nor said Opinion have been officially reported, but both appear in the printed Record (R. 16-23).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 16), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against the United States in the sum of $3,790,335.00, with interest (R. 3), and the judgment entered in said Court and appealed from sustained a demurrer and dismissed said petition (R. 16).

On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's petition on the grounds that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case; and, on June 16, 1924, the Court of Claims allowed the appeal (R. 23).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized on June 23, 1903 (R. 1), that on April 2, 1917, it purchased from the Hamburg-American Line for a consideration of $2,250,000.00 five steamships, named "Nassovia," "Armenia," "Arcadia," "Savoia" and "Saxonia," valued at $450,000.00, $475,000.00, $450,000.00, $325,000.00 and $550,000.00 respectively (R. 1-2), and acquired title to said steamships by and through a Bill of Sale (R. 2; R. 9-13), and was the owner of all of said steamships at the time or times when the possession and title thereto were taken over to the United States, as hereinafter mentioned (R. 2), that on April 6, 1917, all of said steamships were taken into the custody of the United States of America by the Treasury Department, through customs officials, the "Nassovia" and "Armenia" at the Port of New York, the "Arcadia" at the port of Norfolk, the "Savoia" in the waters of the Canal Zone and the "Saxonia" in the port at Seattle, all of said steamships then being German-registered vessels (R. 2), that the vessel "Saxonia" is included in an Executive Order made May 22, 1917 (R. 2; R. 13), and the vessels "Nassovia," "Armenia," "Arcadia" and "Savoia" are included in an Executive Order made June 30,

1917 (R. 2; R. 14-15), and pursuant to said Executive Orders and the authority given in the Joint Resolution (Public Resolution No. 2, 65th Congress), approved May 12, 1917 (40 Stat. 75), the possession and title of said steamships were taken over to the United States (R. 2), that said Joint Resolution prescribed certain uses to which said vessels so taken may be put and contemplates the presentation of claims for compensation, and claimant reading into said Joint Resolution the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founded its claim for which suit was brought upon said provision of the Constitution, said Joint Resolution and/or an implied contract with the Government of the United States, arising out of the facts stated and warranting the inference of an agreement on the part of said Government to pay to claimant a reasonable price for the property taken and to compensate claimant further for the time it was deprived of the use of its property (R. 2), that no compensation has been awarded or paid to claimant by the Government on this claim and that no suit has been brought on this claim in any Court other than the Court of Claims (R. 2-3), that claimant is the sole owner of the claim and is a citizen of the United States, to which it has at all times borne true allegiance, without in any way voluntarily aiding, abetting or giving encouragement to rebellion against said Government (R. 3).

Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that the action sounds in tort and that it is without jurisdiction to hear and determine the case (R. 16). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 23), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation.

CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from a judgment of the Court of Claims (R. 12), entered March 17th, 1924, sustaining a demurrer to claimant's petition and dismissing the said petition on the grounds that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition.

The case set up in said petition shows that the Government, without condemnation proceedings, appropriated private property of an American corporation for certain public uses under legislative authority. By the Executive Orders made a part of said petition by way of exhibits, it appears that the property was physically taken by the official duly authorized by Congress so to do, or by his duly constituted delegates.

Under the provisions of Sections 242 and 243 of the Judicial Code, an appeal to the Supreme Court shall be allowed, under such regulations as the Supreme Court may direct, on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000.00, provided the appeal from the Court of claims is taken within ninety days after the judgment is rendered.

The Supreme Court has assumed jurisdiction to hear and determine such appeals in cases involving points of fact and of law quite analogous to those presented by the present case.

In United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935, Mr. Justice Brandeis, delivering the opinion of the Supreme Court, among other things, said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor.

United States v. Great Falls Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; United States v. Lynah, 188 U. S. 445, 462, 465, 23 Sup. Ct. 349, 47 L. Ed. 539; United States v. Kelly, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746; United States v. Cress, 243 U. S. 316, 329, 37 Sup. Ct. 380, 61 L. Ed. 746.

* * * * * * *

In order that the government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

In A. W. Duckett & Co., Inc., v. United States, 45 S. Ct. 38, which was carried to the Supreme Court by an appeal from a judgment in the Court of Claims dismissing the case for want of jurisdiction, on the ground that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property appropriated by the United States, Mr. Justice Holmes, among other things, said:

"The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.

* * * * * * *

"Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdiction to hear and determine the appeals brought by North American Transportation & Trading Co., and by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its

appeal points of fact and of law quite analogous to those in the cases so heard and determined, believes the said cases sustain the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE.

Suit was instituted in the Court of Claims of the United States on April 5, 1923 (R. 1), by appellant, claimant below, filing in said Court a petition alleging, among other things, the following pertinent facts:

1. That Atlas Line Steamship Company, the claimant, is a corporation created by and existing under the laws of the State of New Jersey, organized on the 23rd day of June, A. D. 1903 (R. 1).

2. That on April 2, 1917, said claimant purchased for $2,250,000.00 and became the owner of five steamships, named "Nassovia," "Armenia," "Arcadia," "Savoia," and "Saxonia," which it continued to own until they were taken from claimant by the United States for its use (R. 1-2), the transfer of title to claimant having been effectuated for said consideration by means of a Bill of Sale signed, sealed and delivered by the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft (Hamburg-American Line) to claimant on April 2, 1917 (R. 2; R. 9-13).

3. That on the sixth day of April, A. D. 1917, all of said steamships were taken into custody of the United States of America by the Treasury Department through customs officials, the "Nassovia" and "Armenia" at the Port of New York, State of New York; the "Arcadia" in the port at Norfolk, State of Virginia; the "Savoia" in the waters of the Canal Zone, and the "Saxonia" in the port at Seattle, State of Washington, all of said steamships then being German-registered vessels (R. 2).

4. That the vessel "Saxonia" is included in an Executive Order made on the twenty-second day of May, 1917 (R. 13) and the vessels "Nassovia," "Armenia," "Arcadia," and "Savoia" are included in an Executive Order made on the

thirtieth day of June, 1917 (R. 14-15), and pursuant to said Executive Orders and the authority given in the Joint Resolution (Public Resolution No. 2, 65th Congress), approved May 12, 1917 (40 Stat. 75), the possession and title of the aforementioned vessels were taken over to the United States, that said Joint Resolution, approved May 12, 1917, which authorized the President to take over to the United States the possession and title of said vessels, prescribes certain uses to which said vessels so taken may be put and contemplates the presentation of claims for compensation (R. 2).

5. That claimant, as the sole owner of the claim set forth in said petition, and not having assigned or transferred said claim or any part thereof or interest therein, and having at all times borne true allegiance to the Government of the United States, reading into the authority under which its property was so taken, the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founds its claim, for which said suit was brought, upon said provision of the Constitution of the United States, said Joint Resolution, and/or an implied contract with the Government of the United States, arising out of the facts and warranting the inference of an agreement on the part of the said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has been deprived of the use of its property, or for the time of the withholding of said price from claimant since the claim first accrued, no compensation having at any time been awarded or paid to claimant by the Government of the United States on said claim (R. 2-3).

6. That claimant brought no suit on this claim, other than the said suit in the Court of Claims, against the Government of the United States or anyone acting for it (R. 3).

On May 26, 1923, the defendant filed a demurrer to said petition (R. 16), the demurrer being worded, as follows:

"Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States." (R. 16.)

On March 17, 1924, the Court of Claims entered an order, as follows:

"This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is hereby sustained, and the petition is dismissed" (R. 16.)

SPECIFICATION OF ERRORS.

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's petition and dismissing said petition.

2. The Court of Claims committed error in holding that claimant's action sounds in tort.

3. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

4. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

ARGUMENT.

I.

The Court of Claims committed error in sustaining defendant's demurrer to claimant's petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

"Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States." (R. 16.)

This demurrer in form and substance is a general demurrer, raising but a single issue, to wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that *a demurrer admits all such matters of fact as are sufficiently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States under due authority of law took for its use, by means of two separate acts of taking, valuable property of claimant, without giving any compensation for the property taken, thus leaving claimant to seek just compensation for the property so taken under such provisions of law as the United States has provided in such cases. The first of said separate takings gave the United States temporary police control over and possession of claimant's property upon the arising of a national emergency, a declaration of war. The second of said takings under the Joint Resolution of May 12, 1917 (40 Stat. 75), vested the title, as well as the possession, of said steamships in the United States. It is submitted that at least the second of these takings, which, under proper legislative authority and without fault of the claimant or assertion of adverse title by the Government, deprived claimant of its title to said steamships, created an obligation on the part of the Government to make just compensation to claimant for the title taken, said obligation arising under the provisions of the Fifth Amendment to the Constitution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349.
DeCamara v. Brooke, 135 Fed. 384.

U. S. v. Buffalo Pitts Co., 234 U. S. 228; 34 S. Ct. 840.
U. S. v. North American Transportation & Trading Co., 253 U. S. 330; 40 S. Ct. 518.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, are, with respect to their effects, two classes of takings: one that deprived appellant of the use and occupation of its property, and the other that deprived it of the title to its said property. It nowhere appears in the record that the Government was without due authority to deprive appellant of either the use and occupation of said property or the title to said property, to meet and supply a governmental need or emergency, it nowhere appears in said record that the Government in either of said takings asserted an adverse claim to said property, against the property rights and title of appellant, but it does appear that appellant, a citizen or subject of the United States, was deprived by the Government of both the use and occupation of appellant's said property and of appellant's title thereto, and it appears further in said record that the taking of claimant's title to said property by the Government was pursuant to the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), and it appears also in said petition that said property, when taken, had a commercial value estimated at $3,790,335.00 and that no compensation has at any time been awarded or paid to appellant by the Government for the property so taken. It is sub-

mitted, therefore, that if the taking of either such use and occupation or the title to said property constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to any taking that created an obligation on the part of the Government to make compensation; for by the facts alleged in the petition, in setting up two separate acts or kinds of taking, one pursuant to the police powers of the United States and the other pursuant to the provisions of the Joint Resolution of May 12, 1917 (40 Stat. 75), said petition presented two statements of facts in the nature of two separate counts, and if one of said counts only is defective, the Court should have given judgment for the claimant upon the good count.

If a demurrer be too large, that is, if it be pointed to all the counts of the statement of the case, where one of them only is defective, the Court will give judgment upon demurrer for the plaintiff, notwithstanding the defective count—Stephen on Pleading, 145.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

It is submitted that the facts stated in claimant's petition set up a cause of action against the United States, said cause of action resting upon an obligation having the elements of contractual liability, and that the Court of Claims committed error in sustaining defendant's demurrer to claimant's petition and dismissing said petition.

II.

The Court of Claims committed error in holding that the claimant's action sounds in tort.

The jurisdiction of the Court of Claims is limited by Section 145 of the Judicial Code so as not to apply to cases sounding in tort. This limitation is founded upon a sound public policy. Commenting on said policy, the Supreme Court by Mr. Justice Brewer, in Schillinger v. United States, 155 U. S. 163, 15 S. Ct. 85, said:

> "Under neither of these statutes had or has the court of claims any jurisdiction of claims against the government for mere torts. Some element of contractual liability must lie at the foundation of every action. In Gibbons v. U. S. Wall. 269, 275, it was said: 'The language of the statutes which confer jurisdiction upon the court of claims excludes by the strongest implication demands against the government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties,' And again, in Morgan v. U. S., 14 Wall. 531, 534: 'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government.' "

It is clear, therefore, that this policy imposed by necessity is aimed at the protection of the Government from liability *for unauthorized wrongs inflicted by their officers on the citizens.* This public policy as thus clearly formulated, can not be made to cover seizures of property expressly authorized by Act of Congress, when the officers making the seizures were acting entirely within their proper legislative authority. No question is raised in the instant case as to the authority of any officer or agent of the United States in the matter of the seizures of the appellant's vessels. In

this case, the appellant, a national of the United States, doing business within the United States, has been divested of its property by reason of the inclusion of that property within the letter of the Joint Resolution of May 12, 1917 (40 Stat. 75). There is no question as to the President's Order being entirely within the authority of said Joint Resolution, nor is there any question as to the authority of any subordinate officers or agents of the Government in carrying out the President's Order.

It is contended, therefore, that the appellant's case is not an action sounding in tort within the meaning of said jurisdictional limitation, since no question of unauthorized action arises.

Furthermore, it is submitted that the cases cited by the Court of Claims in its Memorandum Opinion (R. 16) are clearly distinguishable from the instant case. Both these cases (*Ribas y Hijo* case, 194 U. S. 315, and *Herrera* case, 222 U. S. 558) are Spanish-War-seizure cases and only incidentally involve the jurisdiction of the Court of Claims under the Tucker Act.

The *Ribas y Hijo* case (194 U. S. 315) was an action brought by a Spanish corporation to recover from the United States the value of the use of a merchant vessel seized by the United States military forces in Ponce, Porto Rico, at the time of the capture of that place by American military forces.

The *Ribas y Hijo* case differs from the appellant's case in three important respects:

(1) In the Hijo case, the claimant was a Spanish corporation resident in the actual theater of war, and, therefore, clothed with enemy nationality and subject to the disabilities of that status. In the instant case, the claimant is a corporation of the State of New Jersey, and, therefore, clothed with American nationality and entitled to enjoy all its constitutional rights, including all safeguards to its property.

(2) In the Hijo case, the action was brought against the United States to recover the value of the use of a vessel during the time the vessel was held by the military forces of the United States. In the instant case, the action was brought against the United States to recover the value of the appellant's right, title and interest in its vessels which were completely appropriated by the United States under the authority of the Joint Resolution of May 12, 1917 (40 Stat. 75).

(3) In the Hijo case, the seizure was effected by military forces of the United States in Ponce, Porto Rico, at the time of its capture by American military forces, when this port was in the actual theater of military operations. In the instant case, the seizure was effected by the civil forces of the United States under due authorization by Congress, and in ports of the United States three thousand miles or more away from the scenes of actual military operations. In the Hijo case, the seizure was clearly a military seizure, carried out under the general discretionary authority vested in military officers. If those officers in the exercise of that authority made any mistake in judgment as to the seizure, the resulting wrong to the owner of the vessel was then unauthorized and within the jurisdictional limitations referred to above. There was in the Hijo case no special authorization directing the seizure of the vessel nor any participation in the seizure by civil authorities.

Furthermore, it clearly appears from the decision of the Supreme Court that the tort ground was a secondary and incidental ground of decision in the Hijo case. The primary ground of decision was the mutual relinquishment of claims by Spain and the United States under treaty provisions. This appears in the Opinion of the Court, as follows:

> "We may add that even if the Act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail; for, it is well settled that in case of a conflict between an act of Congress and a treaty,—each being equally the supreme law of the land,—the one last in date must prevail in the courts."

In the Herrera case (222 U. S. 558) there are also grounds of distinction from the instant case, very similar to those in the Hijo case. The claimant in the Herrera case was a Spanish national resident in the war zone, and, therefore, stamped with the status of an enemy alien. The seizure of the vessel was also a seizure made in the actual theater of military operations by United States military officers acting rightly or wrongly under their general discretionary military authority.

The Supreme Court took the same general position in the Herrera case that it took in the Hijo case; that is, that the seizure was military rather than civil; that, if the military officers of the United States acted rightly within their military authority, there was no ground of claim; if they acted wrongly, the wrong was a tort, since it involved unauthorized action by an officer of the Government, and there could be no claim within the jurisdiction of the Court of Claims, and that, in any event, the claim was disposed of under the Treaty of Peace, through the mutual reliquishment of claims by the belligerents on behalf of their respective nationals. With reference to these points, Mr. Justice McKenna, in delivering the opinion of the Court, said:

> "We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemies' property, and subject to seizure, confiscation, and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government, and of the citizens or subjects of the other."
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> * * * * * * *

"We are then brought to consider the quality of the act of the officers of the Army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation, if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in J. Ribas y Hijo v. United States, and Juragua Iron Co. v. United States. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract, and the action is one of which the Court of Claims could not take jurisdiction, whatever other redress is open to claimants."

It is clear, therefore, that in both of the above cases mentioned, cited by the Court of Claims in support of its holding that the instant case sounds in tort, the tort ground was really a secondary consideration in the decision, there being more important war and treaty questions involved. Moreover, even though the tort ground had been the principal ground of the decision, the cases cited by the Court of Claims are readily distinguishable from the instant case. While the cited cases rest upon grounds which bring them clearly within the statutory policy underlying the tort jurisdictional limitations as set forth in the Tucker Act, yet such grounds do not appear in the instant case. The instant case involves no question of unauthorized action by Government officers and no question of losses suffered by an enemy alien within the war zone. It does involve, however, a taking of the possession and title of claimant's vessel as authorized by Congress under circumstances that afford a basis for the implication of a contract.

It is submitted that the cases this Court has decided purely on the tort ground are within the underlying statutory policy of protecting the Government from liability for the unauthorized action of its officers and agents and that they, therefore, have no bearing on the instant case.

EXCERPT

From Statement of Congressman Edmonds During the Debate in the House on the Joint Resolution of May 12, 1917, Relating to the Atlas Line Steamship Company.

Congressional Record, Vol. 55, Pt. 2, p. 1923. Mr. Edmonds:

> "* * * Now I want to go into the question that was brought up this morning as to the Guarantee Trust Company of New York which has loaned to the Hamburg-American Line money for carrying on the necessary repairs, and so forth to these ships while lying in harbor. The Guarantee Trust Company, in order to be protected, undoubtedly had the Hamburg-American people turn these ships over to the Atlas Steamship Co., and the Atlas Steamship Co. endeavored to sell them when they found the war was coming on to the Karr Steamship Co. The Atlas Co. has nothing to fear. They have the right to libel any money that would come from the U. S. Government to the German owners and get their money out of it. I am not a lawyer, but I may say confidently that they will be taken care of in the settlement that will eventually be made for the ships."

A settlement being contemplated, as evidenced by Mr. Edmonds' statement, as well as by Section 2 of the Joint Resolution of May 12, 1917 (40 Stat. 75), does not the instant case sound in contract rather than in tort?

III.

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S.

163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Depart-

ment, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 16), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and in said Opinion the Court said:

> "As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay." (R. 20.)

In United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly appears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied con-

tract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

IV.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 16-23).

In said Opinion, to which the Court of Claims makes reference in its Memorandum (R. 19) for reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852.

> Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court." (R. 16-23).

The "Trading with the enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe said Joint Resolution (40 Stat. 75) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878, 880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since June 23, 1903, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was vessel property, consisting of five steamships, which claimant bought from a German corporation while the United States remained a neutral in the World War. The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken

by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said five steamships of claimant should not be included with said property, as the Alien Property Custodian had no authority under the "Trading with the enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165, 169), Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimler Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not be an "enemy" or "ally of enemy" as those terms are used in the "Trading with the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R. 19-20): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction." Said vessel property of appellant came within the terms and provisions of said Joint Resolution of May 12, 1917 (40 Stat. 75) only in that prior to appellant taking title to said vessels on April 2, 1917, they were owned by the Hamburg-American Line, a German corporation, and had German register. If said Joint Resolution was intended as a war measure for the *capture* of enemy property, and was not intended as an authorization act for the *taking* of property under the right of eminent domain which would carry compensation to the owner, and made no adequate provision either for the return of the property to its proper owner or for the giving of just compensation to said owner if non-enemy property was taken thereunder by mistake, said Joint Resolution, when applied to non-enemy property, would be

in contravention of the Constitutional rights of the non-enemy owner not to be deprived of life, liberty, or property, without due process of law, and not to have his private property taken without just compensation, as to create an obligation on the part of the Government to compensate such owner and a Constitutional basis on which to found a claim upon implied contract within the statutory jurisdiction of the Court of Claims to hear and determine.

As appellant was not an *enemy*, being an American corporation, and its property when taken by order of the President was not *enemy* property, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffs-Gesellschaft, and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

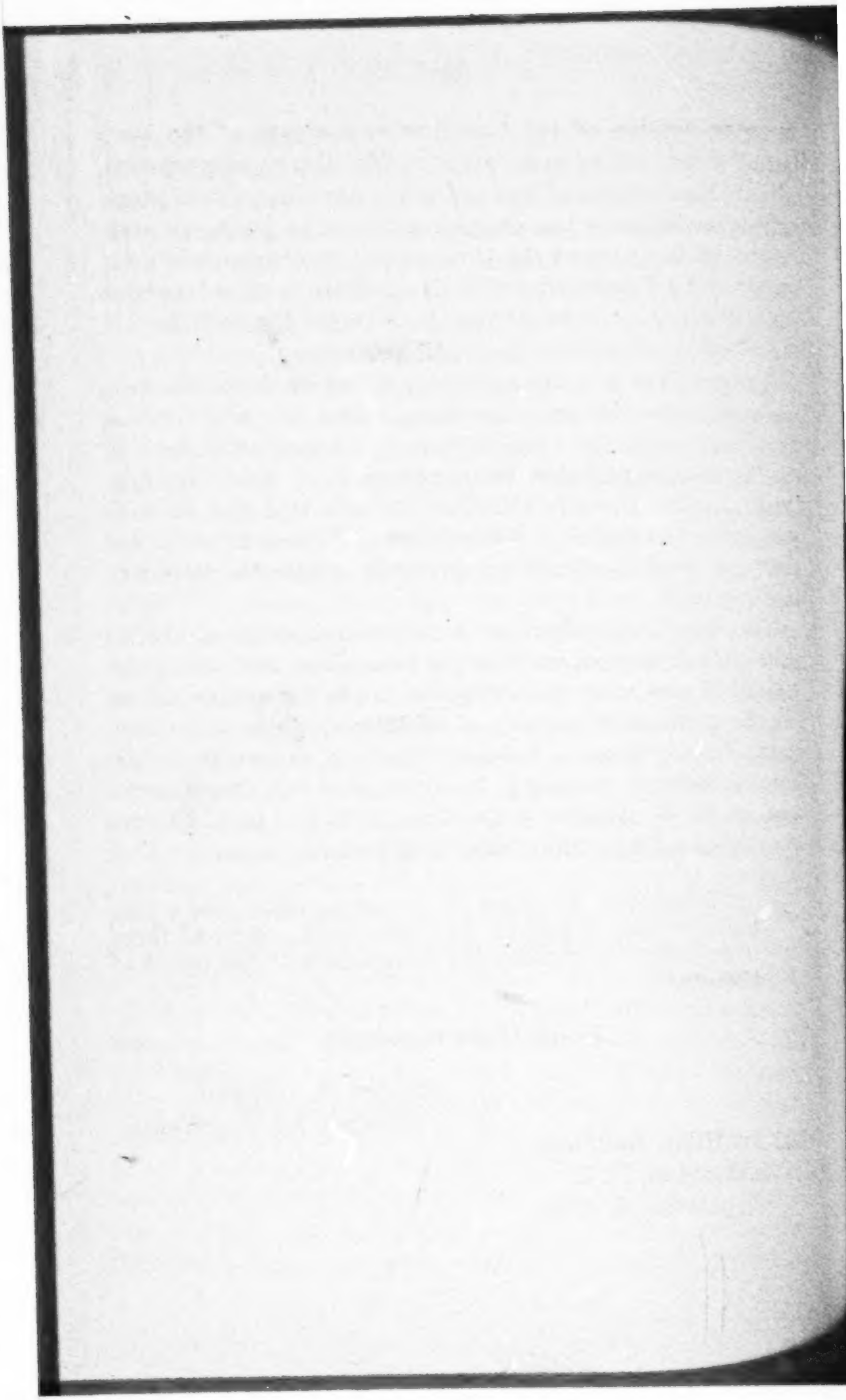
Not only is appellant an American corporation, but its said vessels were already in the possession and use of the United States when the President made the orders directing the possession and title of said vessels to be taken over to the United States. Are not, therefore, the words of Mr. Justice Holmes, as used in the opinion of this Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38), applicable with peculiar force to appellant's case:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims."

Respectfully submitted,

CHARLES H. LEFEVRE,
Attorney for Appellant.

402-3-4 Hibbs Building,
Washington, D. C.
September 4, 1925.



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In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. ~~113~~ 17.

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Temporary Use and Occupation of North German Lloyd Piers at Hoboken

---

No. ~~114~~ 18

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Personal Property of North German Lloyd located on Hoboken Piers and taken over by the United States

---

BRIEF FOR APPELLANT

EDGAR W. HUNT,
Counsel for Appellant

FOREWORD

In April, 1917 the United States, giving written notice that it was acting by authority of the Act of August 29, 1916, 39 Stats. 645, took possession of the North German Lloyd piers at Hoboken. In 1918 it acquired title to the piers by proceedings of the character of eminent domain. In No. 112 compensation is sought for the use of the piers during the period preceding the completion of the proceedings that produced the change of title.

On the piers was personal property belonging to the North German Lloyd, which the United States also took unto itself in possession and title. In No. 113 compensation is sought for the value of this personal property.

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In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. 112.

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Temporary Use and Occupation of North German Lloyd Piers at Hoboken

---

No. 113.

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Personal Property of North German Lloyd located on Hoboken Piers and taken over by the United States

---

BRIEF FOR APPELLANT

(It is believed that the Court's convenience will be served by these two cases being presented in one brief, and in subordination to Case No. 114 of this Term, between the same parties, in which the fundamental principles underlying all three cases are discussed at length, with a full citation of authorities.)

THE OPINIONS BELOW

In each case the Court of Claims filed only a short Memorandum, (R. No. 112, p. 5; R. No. 113, p. 7), holding that it lacked jurisdiction, and referring for its reasoning to its opinion in *Deutsch-Australische Dampfschiffs-Gesellschaft* case, printed in full in R. No. 112, p. 6 and R. No. 113, p. 8.

The Memorandum in No. 112 also referred to the Act of March 28, 1918, 40 Stats. 458, and to Proclamations issued by the President under dates of June 28, 1918 (40 Stats. 1804) and December 3, 1918 (40 Stats. 1914). For reasons to be stated later (infra Point IV) the authorities thus referred to are deemed by appellant to be irrelevant.

Grounds on which the jurisdiction is invoked

These appeals seek reversal of judgments entered in the Court of Claims, sustaining demurrers to the Petitions in the two cases.

Both judgments under review were entered in the Court of Claims on March 17, 1924 (R. No. 112, p. 5; R. No. 113, p. 7).

The claims advanced by appellant in the Court below were as follows:

In No. 112

That by virtue of the Constitution, the Act of Congress of August 29, 1916, 39 Stats. 645 (same Act under which Government operation of the railroads was later undertaken), and implied contract, the United States was obliged to pay appellant the reasonable value of the use of the North German Lloyd piers at Hoboken, on a per diem basis, for the period April 6, 1917 to December 3, 1918; and that appellant had a right to recover the same by suit in the

Court of Claims, under Sections 145 and 155 of the Judicial Code. (For reasons that will appear in the statement, a claim is made, in the alternative, for compensation for the use during the period June 28—December 3, 1918, measured by another standard, if it shall be held that the asserted per diem rate is not the proper measure of compensation for that period.)

In No. 113

That, upon the same grounds as in No. 112 and upon the additional ground of express contract, afforded by a certain memorandum signed by representatives of the United States and those of appellant, the United States was obliged to pay for certain personal property, located on said piers, and the title to and possession of which was taken by the United States under authority of said Act of August 29, 1916 (39 Stats. 645); and that appellant had a right to recover for the same by suit in the Court of Claims, under Sections 145 and 155 of the Judicial Code.

The United States in both cases demurred on the ground that the petition "does not state a cause of action against the United States" (R. No. 112, p. 5; R. No. 113, p. 7).

In both cases the Court of Claims sustained the Demurrer solely on the ground that it did not have jurisdiction (R. No. 112, p. 5; R. No. 113, p. 7). This, it is believed, resulted from an erroneous view of the law.

In both cases appeal was applied for on June 3, 1924 and allowed on June 16, 1924 (R. No. 112, p. 13; R. No. 113, p. 15). The appeals were taken pursuant to Sections 242 and 243 of the Judicial Code (36 Stats. 1157) as the same then stood.

In both actions jurisdiction is believed to be sustained by the following cases: *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; *U. S. v. Lynah*, 188 U. S. 445; *U. S. v. Buffalo Pitts Co.*, 234 U. S. 228; *U. S. v. North American Trans. & Trading Co.*, 253 U. S. 330; *Seaboard Air Line Rwy. Co. v. U. S.*, 261 U. S. 299; *A. W. Duckett & Co., Inc. v. U. S.*, 266 U. S. 149; *Campbell v. U. S.*, 266 U. S. 368.

In the argument it is endeavored to show that the decisions just cited, although evoked by cases which involved only the rights of citizens, are applicable and controlling in the present suits, notwithstanding appellant was an alien enemy at the time its property was taken. The fundamental question in the cases relates to the rights of aliens, in respect of their private property situated here, upon the outbreak of war between their country and ours; and numerous authorities,—the most important being *Brown v. U. S.*, 8 Cranch 110,—are cited to sustain the view that, at least in the absence of an Act of Congress to the contrary, their rights are in this respect the same as those of a citizen.

STATEMENT

These are appeals from two judgments of the Court of Claims sustaining demurrers to the petitions solely on the ground that the Court lacked jurisdiction to entertain the suits. Fundamentally, both cases involve the same question presented in No. 114 of this Term between the same parties, namely, whether the alien enemy owners of property situate in the United States which, during the late war, was taken for public use under statutes (earlier in date than the Trading with the Enemy Act) that ex-

tended to the property of citizen and enemy alike, and that entitle citizens to compensation for property taken, has a right, now that peace is restored, to maintain an action for compensation in the Court of Claims.

In No. 112 compensation is sought for the use and occupation by the United States of appellant's piers at Hoboken from April 6, 1917 to December 3, 1918.

In No. 113 compensation is sought for personal property belonging to appellant and located on said piers, which the United States took over in possession and title at the time that it entered into occupation of the piers, or subsequently.

In entering into the occupation of the piers, and in taking over the personal property, the United States asserted, in writings given to appellant, that it was acting pursuant to the authority of the Act of Congress of August 29, 1916, (39 Stats. 645), reading as follows:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

THE PETITION IN NO. 112

This sets forth facts which may be summarized as follows:

Appellant is a corporation of Germany, whose Government accords to American citizens the right

to sue it in its courts. During the period 1857-1900 appellant purchased various adjoining tracts of land on the Hudson River at Hoboken and built piers thereon and used the same as a terminal for its steamers in the Port of New York. In 1900 its piers were entirely destroyed by fire, and as a business convenience in financing the rebuilding, appellant caused to be organized a New Jersey corporation, called the North German Lloyd Dock Co., all of whose shares (except three to qualify directors) were owned by appellant and to which appellant conveyed all its lands in Hoboken. Thereafter appellant caused said New Jersey corporation to erect on said lands three large piers, a bulkhead building and other structures, provided with appropriate fixtures, the whole constituting a complete and fully equipped steamship terminal.

By lease dated March 20, 1903 the New Jersey corporation demised the entire premises to the appellant for a term of 999 years, and appellant at once entered into possession under the lease. On April 6, 1917, the premises, still being in the possession of appellant as lessee, were entered upon by the United States, acting through the War Department, and troops were quartered on the piers but appellant was not excluded.

On April 20, 1917 the United States took exclusive possession, under 39 Stats. 645, and removed all of appellant's representatives.

On June 28, 1918 title to the premises was acquired by the United States, pursuant to the authority of the Act of March 28, 1918 (40 Stats. 459), and on December 3, 1918 the United States awarded, (it has never paid, but that is immaterial here), compensation for the value of the property thus

expropriated; but has not awarded or paid any compensation for the use of the premises prior to the expropriation and change of title.

Claim is made for the reasonable value of the use on a *per diem* basis for the period April 6, 1917 to December 3, 1918. In respect of the period June 28 to December 3, 1918 (after change of title but before the award of compensation) it is claimed, in the alternative, that if compensation on the basis of a *per diem* rate is not allowed there should be an allowance measured by legal interest on the value as fixed by the award.

The Petition alleges the suit to be founded upon the Constitution, the Act of August 29, 1916 (39 Stats. 645), implied contract, and a claim, not sounding in tort, for unliquidated damages for the reasonable value of the use and occupation.

The jurisdictional averments are made that no action on the claim has been had in Congress; that appellant is the owner of this claim; that no assignment of the claim has been made; that no suits are pending in any other court based upon the facts here involved against any person who was, in respect thereto, acting in behalf of the United States, and that the suit is brought within six years after the claim first accrued.

THE PETITION IN NO. 113

This is, in all respects, like that in No. 112, except that it describes the personal property said to have been "taken out of the possession and ownership of claimant and into the possession and ownership of the United States of America" in six categories, each of which is separately valued. The values stated are alleged to be, in some categories

those fixed by the United States, in other categories those fixed by the United States and the representatives of appellant acting jointly, and in still other categories those fixed by appellant acting alone. There is also set forth a memorandum respecting the property comprised in the first five categories, signed by the representatives of the United States and of appellant. The suit is stated to be founded on the same bases as are named in No. 112, and in addition is said to rest upon express contract with the Government, evidenced by the memorandum just referred to.

WRITINGS GIVEN BY THE UNITED STATES IN CONNECTION WITH THE TAKINGS

As regards Case No. 112, there was served on appellant's representative, on April 17, 1917, the following notice:

"WAR DEPARTMENT

Office of the Depot Quartermaster,

612 New York City, April 17, 1917.

From: Depot Quartermaster, New York, N. Y.

To: Mr. Charles von Helmolt, President, The North German Lloyd Dock Company, 5 Broadway, New York, N. Y.

Subject: U. S. taking possession of North German Lloyd Dock Company's property in Hoboken, N. J.

1. In confirmation of the notice served upon you orally on the afternoon of April 16, 1917, you are informed that, by direction of the President of the United States, and under

authority of the Act of Congress of August 29, 1916 (39 Stat. 645), I hereby take possession and assume control,—for the purposes stated in the said Act of Congress, as embodied in letter from the Secretary of War, dated April 16, 1917, copy herewith, and will utilize the same to the exclusion of all other traffic,—of the following property of the North German Lloyd Dock Company, Inc., of New Jersey, situated in Hoboken, New Jersey, United States of America, viz.:

> 'All the land and water front, including the piers, sheds thereon, bulkhead building and all other buildings and improvements thereon, and all movable property used in connection with the operation of the piers and the handling of shipping, owned by the North German Lloyd Dock Company, Inc., of New Jersey, situated in the City of Hoboken, New Jersey, bounded on the west by River Street, on the north by Fourth Street and the property of the Holland America Line, on the east to and including the modified pierhead line in the Hudson River, approved by the Secretary of War March 1, 1913, and on the south by the northerly limits of the property of the Hamburg-American Line Terminal and Navigation Company.'

2. You are hereby directed to have made a careful and accurate inventory of all movable property on the premises referred to above, for the use of the undersigned in connection with the checking and examination of such movable property; and to have removed from said premises, or to have stored thereon as may be approved by the undersigned, any

private property or merchandise that may be at present temporarily stored thereon.

3. The turnover of the above named property, fixed and movable, and the removal of privately owned property and merchandise, to be completed not later than 12 o'clock noon of April 23, 1917.

4. You will also cause to be removed from said premises all employees of the North German Lloyd Steamship Company or of the North German Lloyd Dock Company, who may now be residing or at work within the limits of said premises, in accordance with the terms of the notice given to you orally on the afternoon of April 16, 1917, same to be completed by noon of April 23, 1917, except in the cases of such special employees as may be approved by the undersigned, and where such delay is in the interests of the United States Government and the North German Lloyd Dock Company.

5. Enclosed herewith is a copy of the instructions of the Secretary of War, which is furnished for your information and that of the owners of the property, as per instructions in that letter.

6. Please acknowledge receipt.

(Sgd) J. M. Carson,
Colonel, Q. M. Corps.

1 enclosure
LMO—JMC"

Attached thereto was a letter of instruction from the Secretary of War to the Depot Quartermaster, reading as follows:

"WAR DEPARTMENT

Washington, April 16, 1917.

The Depot Quartermaster,
New York, N, Y.

(Through the Quartermaster General)

Sir:

Under authority of the Act of Congress of August 29, 1916 (39 Stat. 645), providing that:

'The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable,'

the President directs that you take possession and assume control, for the purposes stated in the said Act of Congress, quoted above, and to utilize the same to the exclusion of all other traffic, of the following property in Hoboken, New Jersey:

The Hamburg-American Piers and the North German Lloyd Piers and the lands and buildings appertaining to said piers, which property is more particularly indicated and described in the map annexed hereto.

You will notify the persons now in possession of the said property, and the owners thereof, if known, of the contents of this order, and furnish them copies of the same.

(Sgd.) Newton D. Baker,
Secretary of War."

In regard to Case No. 113, there was signed by representatives of the United States and of appellant the following memorandum referring to the property comprised in the first five categories set forth in the Petition in this case:

> "At a meeting held at the office of The New York Trust Company, at No. 26 Broad Street, New York City, on June 26, 1918, at ten a. m., at which were present Mr. Frank E. Williamson, representing the North German Lloyd; Mr. G. Friedrichs, former Chief Dock Clerk, of the North German Lloyd; Messrs. Otto T. Bannard, Morgan M. Mann and Gilbert S. McClintock, representing the Alien Property Custodian; Col. A. C. Blunt, U. S. A.; Col. F. H. Schoeffel, U. S. A., and Paymaster J. Lyman Pratt, U. S. Navy, comprising the joint Board of the War and Navy Departments respectively, and Captain Lawson Sandford, Asst. to the General Superintendent, Army Transport Service, New York, there was submitted an inventory showing the quantities and articles of movable property, material, gear and supplies owned by the North German Lloyd, for which the Army is considered responsible, as a result of the selections by the Appraisers for the Army in April and May, 1917. This was marked for identification by Mr. Bannard, Col. Blunt, Paymaster Pratt and Mr. Friedrichs.
>
> There was added to this inventory similarly marked for identification, a group of North German Lloyd property of similar type, which the Appraisers had not recommended in April and May, 1917, but which was retained in Army possession, and is recommended to be incorporated as a part of the inventory aforesaid.

To complete the responsibility and record of the Army, there was also added for record certain items of office furniture which the Army subsequently acquired from the North German Lloyd, likewise similarly marked for identification.

The three groups shall be combined, written out and shall constitute the official inventory and record of all the movable property of the North German Lloyd in the hands of and chargeable to the War Department at its Hoboken Piers on April 17, 1917, and shall be executed by the representatives of the several interests concerned. This procedure was agreed to by all present, and the question of values was not raised.

Separate and apart from this settlement is involved the determination of responsibility for certain miscellaneous property of the North German Lloyd (mainly ex ships) reposing on April 17, 1917, in certain rooms on the upper deck of the bulkhead building. The matter is under adjustment in respect to the present location and identification of this miscellaneous property, and if it is not accounted for, or turned over to Mr. Bannard, Alien Property Custodian, to his satisfaction, the Joint Army and Navy Board, hereby decide to recommend to the War Department that the responsibility rests upon the War Department. To establish the record a special supplement to the main inventory determined above shall be written and executed forthwith in similar manner.

It is agreed that the North German Lloyd and not the North German Lloyd Dock Com-

pany was the owner of all the property referred to.

(Sgd.)

Otto T. Bannard, for Alien Property Custodian.

A. C. Blunt, Lt. Col. U. S. A. for U. S. Army.

Frank E. Williamson, Attorney for North German Lloyd."

Specification of Errors

The error complained of is that the Court of Claims held that it was without jurisdiction to hear and determine appellant's claims, whereas it should have held that it had jurisdiction under Sec. 145 of the Judicial Code. (36 Stats. 1136).

Summary of Appellant's Argument

Enemy private property found here at the commencement of war cannot be confiscated unless an Act of Congress authorizes it. In these cases there was no such Act. The taking of the property for public use under a pre-war statute that applied generally to all property within the territorial jurisdiction entitled the owner to compensation. Now that peace is restored an action may be maintained under Sec. 145 of the Judicial Code (the benefit of which is given to this appellant, although an alien, by Sec. 155) to have the amount of the compensation determined.

An award made (not paid) when the fee of the pier property was acquired by the United States in

1918 did not include the claim involved in No. 112, and does not bar suit.

An affirmance of the judgments below would overrule *Brown v. U. S.*, 8 Cr. 110. In effect, it would work a confiscation not authorized by statute, and therefore would infringe upon a field which, under the Constitution, belongs exclusively to Congress.

ARGUMENT

I

The property involved in these suits was taken for public use, by express direction of the President, who declaredly acted in pursuance of a statute passed eight months before the commencement of the war, and which does not mention confiscation.

In *Brown v. U. S.*, 8 Cranch 110, this Court was called upon to determine the rights of the owners of "property found on land at the commencement of hostilities" and belonging to a subject of the enemy. This is such a case.

In the case cited the U. S. Attorney sought, by libel filed in the District Court, to procure a decree condemning certain property as enemy property forfeited to the United States. It was decided that such property might *not* "be seized and condemned as a necessary consequence of the declaration of war;" and that proceedings to condemn it "can be sustained only upon the principle that they are instituted in execution of some existing law." (8 Cranch at p. 123). The Court also remarked that "It is urged that in executing the laws of war the Executive may seize and the Courts condemn all property which according to the modern law of nations is subject to confiscation * * *", and in reply to this said: "This position is not allowed."

The general doctrine of the case is that Congress *may* authorize the confiscation of such property, but that unless Congress does so, it is immune from confiscation. The case seems fairly to warrant the assertion that a subject of the enemy owning property located in our territory, and outside the theatre of war or of hostile operations, is not to be treated, in respect of such property, in any different manner than a citizen, unless Congress authorizes different treatment. From this it would logically follow that unless Congress has shown an intention to the contrary, the taking of such property by the Government for public use gives the owner the same right to be compensated as would be his if he were a citizen. (Of course his right to sue is suspended while war continues, but it revives with the restoration of peace. *Hanger v. Abbott,* 73 U. S. 532).

No case analogous to these has come before this Court since the decision in *Brown v. U. S.,* supra. The Civil and Spanish War cases presented questions not analogous, because some of them (e.g., *Miller v. U. S.,* 11 Wall. 268) arose under statutes that expressly authorized the confiscation of property intended to be used to aid the Rebellion, and property belonging to rebels; and others (e.g., *Klein's Case,* 13 Wall. 128; *Lamar v. Browne,* 92 U. S. 187; *Ribas y Hijo v. U. S.,* 194 U. S. 315; *Juragua Iron Co. v. U. S.,* 212 U. S. 297; and *Herrera Nephews v. U. S.,* 222 U. S. 558) related to property captured by military forces in the course of hostile operations in enemy territory. *Juragua Iron Co. v. U. S.* is distinguishable on the further ground that the property involved was not *taken* for public use, but injured or destroyed by a lawful action without a taking—in which case no

liability arises (*Omnia Commercial Co. v. U. S.*, 261 U. S. 502, and cases therein cited).

The most recent expression of judicial opinion on the fundamental question now presented is that of Judge Morris in the U. S. District Court for Delaware in *U. S. v. Chemical Foundation* (1924) 294 Fed. 300. He said:

> "Enemy property found upon land in the United States cannot be condemned as enemy property without an act of Congress. The declaration of war is not such an act."

Unless, however, the decision below is reversed, that which our Courts have thus for more than a hundred years said could not be done, is done by the simple expedient of closing the doors of courts of justice, for no other reason than that the owner of the property, for the taking of which compensation is sought, was an enemy at the time it was taken.

II

No Act of Congress purports to subject the property, the taking of which gives rise to these suits, to any different treatment than that accorded to property in general under our Constitution and laws, nor to deprive its owner of any rights in respect to it enjoyed by property owners in general. The taking occurred prior to the Trading with the Enemy Act 40 Stat. 411, (approved October 6, 1917) and was expressly based upon the Act of August 29, 1916 (39 Stats. 645).

The President did not assume the property to be subject to extraordinary measures on account of its ownership, for in taking over, in No. 112 the possession and use, and in No. 113 the ownership, he

invoked as the source of his authority the Act of Congress just cited, under which, at later dates, the property of citizens was acquired for like purposes —for instance, the railroads taken into Government possession and control in December, 1917, and the pier property known as the Bush Terminal in Brooklyn involved in *A. W. Duckett & Co., Inc. v. U. S.*, 266 U. S. 149, (decided Nov. 17, 1924). Of course, the taking was a "war measure", but only in the sense that the taking over of the railroads was, concerning which this Court said, in *duPont de Nemours & Co. v. Davis*, 264 U. S. 456 (at p. 462):

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain.'"

Nothing in the Act of Congress, in the President's directions, in the instructions of the Secretary of War to the Depot Quartermaster, or in his notice to appellant's agent, indicates that the taking of the property involved in either of these cases was intended as an exercise of war powers against enemy property. On the contrary, they expressly negative such a theory. (See, supra, "Writings given by the United States in connection with the takings.") Had the executive officials mentioned—even the highest of them—desired to give the takings such a character, they would have been powerless to do so, in view of the *Brown* case, for lack of statutory authorization.

III

In *Campbell v. U. S.*, 266 U. S. 368, decided December 8, 1924, in the words of this Court:

> "An officer of the army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land * * *"

Pointing out that under the Acts of June 3, 1916 (39 Stats. 215) and July 2, 1917 (40 Stats. 241) as amended April 11, 1918 (40 Stats. 518), the President and Secretary of War were authorized to purchase or condemn the lands, the Court declared that "the taking was under the sovereign power of eminent domain", and entitled the owners to recover.

Thus this Court held that a mere taking, when authorized by a statute, gives rise to a right of compensation, although no words are uttered to explain the intent of the taking or lend aid to the presumption of an implied contract to pay.

In the *Duckett* case (supra), decided a few weeks prior to the *Campbell* case, the Court apparently preferred not to pass on the effect of a mere taking, without words to show its character, for it said:

> *"Whatever the effect of the taking,* there was a contract implied in fact by the President's order, and there is no doubt concerning the jurisdiction of the Court of Claims." (Italics counsel's).

The only part of the President's order from which an implied contract could thus be said to arise was this: "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises". It cannot be doubted, especially since the decision in the *Campbell* case, supra, that without these words the same

result would have been reached. In fact, *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, forbids any other result, for in that case a property owner was held entitled to compensation for property (a franchise) for which an Act of Congress had expressly directed that no compensation should be allowed. The Court found that the Constitution rendered such a direction nugatory.

Appellant, therefore, is clearly entitled to be compensated unless it can be held that its alien enemy status, *ipso facto*, deprived it of property rights in respect of property situated in our territory and outside the theatre of war. This, as has been stated, seems to run contrary to *Brown v. U. S.* and to what was said by the District Court in *U. S. v. Chemical Foundation*, supra.

The Court below evidently thought that a distinction was to be observed between a right to be compensated and a right to sue. But since the plaintiff is no longer an enemy, but a friendly alien, whose Government allows Americans to sue it in its Courts (Petition, both cases, Par. 1 & 2) Sec. 155 of the Judicial Code* (36 Stat. 1139), seems to bar the drawing of such a distinction. If plaintiff has a *right* to be compensated, the Court of Claims is the forum in which to prosecute it. Before Congress plaintiff could not assert rights, but only plead for grace and favor.

The reasoning of this Court in *The Western Maid*,

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*"Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

257 U. S. 419, seems, by analogy, to deny the existence of such a distinction as the Court below sought to draw. In the case cited this Court reasoned that since the United States could not be held legally liable for a tort, it could not, in a legal sense, commit a tort. By parity of reasoning, if the appellant in this case cannot be denied a right to compensation, it cannot be denied a right to sue for compensation, since by Section 145 of the Judicial Code sovereign immunity from suit is waived, and by Section 155 the appellant, although an alien, is entitled to sue in the Court of Claims.

IV

In its Memorandum in No. 112 (Record, p. 5), the Court of Claims referred to the Act of March 28, 1918 (40 Stats. 458) and the President's Proclamations of June 28, 1918 (Ibid, 1804) and December 3, 1918 (Ibid, 1914) by means of which the title to the pier property was divested from the former owners (both lessor and lessee) and vested in the United States. Presumably the Court below intended by this reference to suggest that the award made (but never paid) in favor of appellant, in connection with this change of title, included a sum representing compensation for the period of temporary use prior to the change in title. A study of the documents mentioned, however, indicates that such a conclusion is not warranted. The Act of March 28, 1918 (40 Stats. 459) reads as follows:

> "The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-

American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: Provided, That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States: Provided Further, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired."

The President's Proclamation of June 28, 1918 was in form as follows:

"By the President of the
United States of America

A Proclamation.

Whereas the Act of Congress making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public-No. 109-65th Congress), contains the following provisions:"

(Here is set forth the full text of the Act, as printed above.)

"Now, Therefore, I, Woodrow Wilson,

President of the United States of America, pursuant to the authority vested in me by the said Act of Congress approved March 28, 1918, do hereby determine and declare that the acquisition of title to the foregoing docks, piers, warehouses, wharves, and terminal equipment and facilities, is necessary for the National security and defense and I do hereby take over for the United States of America the immediate possession and title thereof including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto.

Just compensation for the property hereby taken over will be hereafter determined and paid.

In Witness Whereof, etc. * * *"

In the Proclamation of December 3, 1918 the President, after reciting the Act, and the things done by the Proclamation of June 28, continued as follows:

"And Whereas, pursuant to the authority vested in the President by said Act of Congress, approved March 28, 1918, it was in and by said proclamation of June 28, 1918, expressed and declared that just compensation for the property thereby taken over would be thereafter determined and paid;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, pursuant to the authority vested in me by the said Act of Congress, approved March 28, 1918, do hereby determine and declare that the just compensation for the property in and by said proclamation of June 28, 1918, expropriated for the United States of America is the sum of * * * and I do hereby order and direct that compensation for the same * * *

be made out of the money appropriated by the act * * * to the parties and in the amounts set forth in the schedule marked A, hereto annexed; * * *"

In the Schedule this is set forth:

"Schedule of compensation for the docks, piers, warehouses, wharves, and terminal equipment and facilities expropriated by the proclamation of the President on June 28, 1918, pursuant to the Act of Congress, approved March 28, 1918.

* * *

"II. In respect of the following properties:"

(Here follows a description of the premises owned by the North German Lloyd Dock Company and held by appellant under its 999 year lease.)

"To the North German Lloyd Dock Company a corporation of the State of New Jersey, in respect to its reversion, the sum of one dollar ($1.00).

To the North German Lloyd, a corporation of the Free and Hanseatic City of Bremen in the German Empire, $4,831,705 less $47,500, interest paid to the said Prudential Life Insurance Company of America on account of the obligation of said North German Lloyd, namely, four million seven hundred and eighty-four thousand, two hundred five dollars ($4,784,205), to be paid to A. Mitchell Palmer, Alien Property Custodian, appointed under the provisions of the Trading with the Enemy Act, the same to be held by him subject to the provisions of said Act, as directed in the foregoing and annexed proclamation, said sum of $4,784,205 to be chargeable with the payment and satisfaction of all liens, by way of mortgage, judgment or other-

wise, existing on, and all taxes and assessments due and exigible on, the foregoing premises or any part thereof, on the 28th day of June, 1918."

Thus it appears that, by the statute, the President was authorized to "acquire the title" for the United States; and that by the first Proclamation he did so acquire the title. (He also "took over the immediate possession", but that could have had no other purpose or effect than to render regular a possession—possibly thought to have been irregular in its inception—that had already continued for 14 months.) In the second Proclamation he declared that "just compensation for the property *expropriated in and by said Proclamation of June* 28, 1918," was so much, and ordered "compensation for the same" to be made. The Schedule, by its heading, covers compensation for *the property expropriated by the Proclamation of June* 28.

As a Proclamation issued in June, 1918 could hardly "expropriate" a possession dating from April, 1917, and as the award is expressly limited to compensation for "the property in and by said Proclamation of June 28, 1918 expropriated", it seems impossible to hold that the award includes compensation for the use of the property prior to its expropriation. The language of the President's Proclamation of December 3 is a clear expression to the contrary.

Of course the owner is as much entitled to compensation for the deprivation occasioned by a temporary taking for public use as he is for a taking of the fee. *A. W. Duckett & Co., Inc. v. U. S.*, supra; *Hepburn v. Jersey City* (1901) 67 N. J. L. 114 (af-

firmed, Ibid, 686); *Brigham v. Edmands,* 7 Red. (Mass.) 359; *Johnson's Case,* 2 Ct. Cls. 319.

V

So far the argument has proceeded on the theory that there was a taking of such a character as to give rise to a right to be compensated and a right to sue in the Court of Claims, founded upon the Constitution if the rule in *Monongahela Nav. Co. v. U. S.* supra, and *Seaboard Air Line R. Co. v. U. S.,* 261 U. S. 299, is followed; or founded upon the Act of August 29, 1916 (39 Stats. 645) if the rule of *Campbell v. U. S.,* supra, is followed; or founded upon implied contract, if that rule is followed which is laid down in *U. S. v. Great Falls Mfg. Co.,* 112 U. S. 645; *U. S. v. Lynah,* 188 U. S. 445; and *U. S. v. North American Trading & Trans. Co.,* 253 U. S. 330. And it has been assumed that the alien enemy status of the appellant did not deprive it of the benefit of the doctrine enunciated in these cases, for the reason that Congress had evinced no intention of that kind.

In No. 113 an additional basis of liability is asserted, namely, express contract arising from the Memorandum of June 26, 1918, signed in behalf of the United States by a representative of the Alien Property Custodian and by a Lieutenant Colonel of the Army who was one of several gentlemen described in the Memorandum as "comprising the joint Board of the War and Navy Departments". This Memorandum related to an inventory of property respecting which it was "agreed that the North German Lloyd and not the North German Lloyd Dock Company was the owner". It spoke of a part of this as property "for which the Army is considered re-

sponsible, as a result of the selections by the appraisers for the Army in April and May, 1917". Other portions of the property are "recommended to be incorporated as a part of the inventory" of that so selected by the appraisers. With regard to still other property it is said that "to complete the responsibility and record of the Army there was also added for record certain items of office furniture which the Army subsequently acquired from the North German Lloyd". It is said that "the three groups shall be combined, written out, and shall constitute the official inventory and record of all of the movable property of the North German Lloyd in the hands of and chargeable to the War Department at its Hoboken piers on April 17, 1917 * * *". And with regard to certain further property omitted from the record thus made up, it is said that "the Joint Army and Navy Board, hereby decide to recommend to the War Department that the responsibility rests upon the War Department". A supplemental inventory was agreed to be made up.

It is competent for Government to trade and enter into binding contracts with citizens of the enemy. *U. S. v. Lane,* (1869) 8 Wall. 185. A sophist might say that the Memorandum falls short of constituting a contract—that there is a distinction between recognizing "responsibility" or becoming "chargeable" and agreeing to meet the responsibility or the charge. A sophist might have spoken similarly concerning the phrase which this Court, in the *Duckett* case, held to raise "a contract implied in fact". At least, however, it may be said that if the Memorandum falls short of binding the United States in express contract to pay the owner the reasonable value (or the agreed value where value was

agreed upon,) it does warrant the finding of an implied promise; and of course it renders impossible the contention that this personal property was treated by the Government as a war capture or booty.

VI

Except for the fact that the owner was, at the time of the taking, an alien enemy, there could be no doubt of its right to recover compensation and no doubt concerning the jurisdiction of the Court of Claims under Section 145 of the Judicial Code. (36 Stat. 1136).

To affirm the decision of the Court of Claims sustaining the demurrer would, therefore, overrule *Brown v. U. S.*, supra, and be equivalent to a declaration that whenever the United States becomes involved in a war, even though the scene of hostile operations be wholly outside our territory, all property located here and belonging to subjects or citizens of the enemy, becomes liable, not only to be subjected by the United States to temporary public use, involving dispossession of the owner, (No. 112), but also to be taken into the actual ownership of the United States (No. 113), without any right to compensation arising in favor of the owner. It means also that the taking for temporary use, or the divestiture of title, free from obligation to compensate, may be accomplished under the authority of statutes which extend to the property of citizens, although if applied against such property involve an obligation to pay compensation.

The danger of retaliation pointed out by Marshall in the *Brown* case (see foot of p. 128 of 8 Cranch) would thus be incurred, and that not as the result of the act of the legislative branch of the government

which, Marshall says, alone may subject enemy property to treatment different than that accorded the property of citizens; but as the result of judicial decision interpreting in one way as regards citizens' property and in another as regards enemies' property, a statute which on its face purports to create no distinction.

For the reasons stated it is respectfully submitted that the decision of the Court of Claims ought to be reversed and the Record remitted to that Court with instructions to allow these cases to proceed.

If the Government should contend that the Peace Resolution of July 2, 1921 (42 Stats. Part I, 105) or the Treaties of Versailles and Berlin annul rights or bar remedies that appellant might otherwise possess, leave is respectfully prayed to refer to Point V of the Brief in No. 114 for an answer to such contention.

Respectfully submitted,

EDGAR W. HUNT,

Counsel for Appellant.

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*NOTE:—On pages 2, 14 and 21 of this brief, reference is made to the allusion by the Court of Claims in its memorandum in case No. 112 to 40 Stat. 458. It is believed that the Court below intended to refer to 40 Stat. 459.

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WM. R. STANS
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Supreme Court of the United States

OCTOBER TERM, 1925

No. ~~114~~ 19.

NORTH GERMAN LLOYD, APPELLANT

versus

THE UNITED STATES OF AMERICA,
APPELLEE

APPEAL FROM COURT OF CLAIMS

Compensation for Expropriated German Merchant Ships

BRIEF FOR APPELLANT

EDGAR W. HUNT,
Counsel for Appellant

FOREWORD

Contrary to a belief more or less widely held, the German ship-owners have not received and are not entitled to compensation from their own Government for ships that, having taken refuge in American harbors prior to our entering the war, were taken over by the United States after that event. (See infra p. 112). Unless therefore, relief is accorded them in the suits now pending, of which this is one, they will be wholly without legal remedy for the loss of over 500,000 gross tons of shipping to which the United States acquired absolute title by measures hereinafter referred to.

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Extension thereof under following heads:

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I(c). The debates in Congress prove that it was not by inadvertence, but by intention that the Joint Resolution was enacted in a form that created an obligation to pay compensation for the property rights of which the ship-owners might be divested 24

I(d). President Wilson, a member of his cabinet, an official of the State Department under his administration, and also former Secretary of State Hughes, acting in a private capacity, have all given utterance to state-

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I(e). From the beginnings of the United States until the present time, its public policy, with regard to the treatment of enemy property, has been such that an intention to confiscate can never be presumed, but, if alleged, must be clearly shown to exist 31

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 114

NORTH GERMAN LLOYD,
Appellant

versus

THE UNITED STATES OF AMERICA,
Appellee

BRIEF FOR APPELLANT

Compensation for Expropriated German Merchant Ships

THE OPINION BELOW

For opinion referred to by Court of Claims in support of Memo in instant case, see Deutsch - Australische Dampfschiffs - Gesellschaft v. United States, 59 Ct. Cls. 450, and transcript in this case, p. 7.

For Memo in the instant case see Transcript of Record p. 7 and this Brief p. 6.

Grounds on which the jurisdiction is invoked

The judgment under review (sustaining Defendant's demurrer) was entered in the court of Claims March 17, 1924 (R. 7).

In that Court appellant advanced the claim that the United States was obliged, by virtue of the Constitution (Amendment V), a Joint Resolution of

Congress adopted May 12, 1917 (40 Stats. 75, this brief p. 3), and implied contract, to pay appellant the market value of certain merchant ships belonging to it and expropriated by the United States; and that appellant had a right to recover such market value by suit in the Court of Claims. (Petition, R 1, et seq.) The defendant demurred on the ground that the petition did not state a cause of action. The Court of Claims sustained the Demurrer solely on the ground that it did not have jurisdiction of the suit (R. 6-7.)

Appeal was applied for June 3, 1924 and allowed June 17, 1924 (R. 14, pursuant to Sections 242 and 243 of the Judicial Code (36 Stats. 1157), as the same then stood.

The following cases are believed to sustain the jurisdicton: *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; *U. S. v. Lynah*, 188 U. S. 445; *U. S. v. Buffalo Pitts Co.*, 234 U. S. 228; *U. S. v. North American Trans. & Trading Co.*, 253 U. S. 330; *Seaboard Air Line Ry. Co. v. U. S.*, 261 U. S. 299; *A. W. Duckett & Co., Inc. v. U S.*, 266 U. S. 149; *Campbell v. U. S.*, 266 U. S. 368.

In the argument it is endeavored to show that the decisions just cited, although evoked by cases which involved only the rights of citizens, are applicable and controlling in the present suit, notwithstanding appellant was an alien enemy at the time its ships were taken. The fundamental question in the case relates to the rights of aliens, in respect of their private property situated here, upon the outbreak of war between their country and ours; and numerous authorities,—the most important of these being *Brown v. U. S.*, 8 Cranch 110,—are cited to sustain the view that, at least in the absence of an act of Congress to the contrary, their rights are in this respect the same as those of a citizen.

STATEMENT.

This suit seeks compensation for 29 merchant ships, of an aggregate tonnage of 230,000 tons, formerly belonging to claimant, the title to which was acquired by the United States by virtue of Proclamations issued by the President pursuant to a discretionary power vested in him by a joint Resolution of Congress approved May 12, 1917 (40 Stats. 75), reading as follows:

> "Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes:
>
> *"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency

of the Government, to operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized, and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

The Petition (R. 1) sets forth facts which may be summarized as follows:

Appellant is a corporation of Germany, whose government accords to American citizens the right to sue it in its courts. For many years prior to 1914 appellant operated steamship services in all parts of the world, which it was compelled to discontinue at the outbreak of the war in Europe in August, 1914. Such of its ships as were then in American harbors remained there, and others which were at sea abandoned their voyages and ran into American harbors, as ports of refuge, for the purpose of escaping capture by the enemy, who controlled the seas. The whole number of appellant's ships which thus sought refuge in our territory (then neutral) was 29, of an aggregate tonnage of about 230,000 tons. They were all merchant ships and at the outbreak of the war had been engaged in ordinary commercial voyages.

On April 6, 1917, Congress adopted a Joint Res-

olution (40 Stats. 1), formally declaring the existence of a state of war between the United States and Germany, and on the same day all of appellant's vessels were entered upon and taken possession of by the United States, acting by and through its officers and agents.

Later and at various dates within not more than one year from May 12, 1917, the actual title to all of said ships was taken over to the United States, by Proclamations issued by the President pursuant to the authority given him by the said Joint Resolution of May 12, 1917, printed above.

Appellant sues for the property values which it lost and the United States gained when title passed to the United States.

The petition alleges the suit to be founded upon the Constitution, the aforesaid Joint Resolution, an implied contract to pay compensation, and a claim not sounding in tort for damages.

The jurisdictional averments are made that no action on the claim has been had in Congress, that appellant is the owner of its claim, that no assignment of the claim has been made, that no suits are pending in any other court based upon the facts here involved against any person who was, in respect thereto, acting in behalf of the United States, and that the suit is brought within six years after the claim first accrued.

Several Proclamations, (all in substance alike), taking title to ships, were issued by the President under authority of the Joint Resolution of May 12, 1917. The principal one, by which the ownership of 69 vessels, including all but 4 of those taken from

appellant, was acquired by the United States, was issued June 30, 1917, and was in form as follows:

"Whereas the following joint resolution adopted by Congress was approved by the President May 12, 1917:

"Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes:

(Here is set forth the complete text of the Joint Resolution.)

"And whereas the following vessels were, at the time of coming into the jurisdiction of the United States, owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

(Here is set forth a list of vessels.)

"It is therefore ordered that through the United States Shipping Board *there be taken over to the United States the possession and title of the aforementioned vessels.* The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease, or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes

of the joint resolution above set forth. (Italics counsel's.)

Woodrow Wilson.

The White House, June 30, 1917."

The only respect in which any other Proclamations taking ships differs from the foregoing is that in some of them the agency appointed to take over the ships was the Navy Department instead of the Shipping Board.

The Demurrer (R. 6) is in the following words:

"Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States."

For the grounds of its decision in this case the Court referred in its Memorandum (R. 6) to its opinion in the case of *Deutsch-Australische Dampschiffs-Gesellschaft v. U. S.*, printed at p. 7 of the Record in this case. By reference to this opinion it appears that the reasoning upon which the Court reached the result stated was that appellant's claim was not founded upon the Constitution or a law of Congress, and that it was sustainable, if at all, only upon the theory of implied contract. This theory is rejected upon the reasoning that "Manifestly the Joint Resolution was an exercise of the war power of Congress. It finds support in the Constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water." In support of this reasoning, reference is made to powers granted the Alien Property Custodian under the Trading with

the Enemy Act, (40 Stats. 411), and to the doctrine that Congress has power to confiscate enemy property, and the exemplification of that doctrine afforded by cases arising out of incidents of the Civil War. Further support is sought by reference to cases arising out of incidents of the Spanish War, in which the seizure of enemy vessels in enemy waters by our Naval forces in the course of hostile operations was held not to give rise to a right to compensation.

Specification of Errors.

The error complained of is that the Court of Claims held that it was without jurisdiction to hear and determine appellant's claim, whereas it should have held that it had jurisdiction under sec. 145 of the Judicial Code. (36 Stat. 1136).

Summary of Appellant's Argument.

Appellant's argument will proceed along the following lines:

Affirmatively.

I. The taking of the ships was, in essence, an exercise of the power of eminent domain.

II. Such being the case, a right to compensation arises as matter of law, finding support in the Constitution, in the Joint Resolution of May 12, 1917, and in the theory of implied contract.

III. As there is a right to compensation, there is jurisdiction in the Court of Claims under Section 145 of the Judicial Code to entertain a suit to determine its amount.

IV. These propositions, undeniably true if the property taken had been owned by a citizen, are, in the circumstances of this case, no less true because the owner at the time of the taking was an alien enemy.

By Way of Negation.

To meet a defense asserted by the United States in the Court below but unnecessary to be decided there because that Court declined to assume jurisdiction, appellant will also argue.

V. The Peace Resolution of July 2, 1921, and the Treaties of Berlin and Versailles do not destroy appellant's right nor bar its remedy.

As the outline indicates, the argument, down to the end of Point III, will assume that the rights of appellant are precisely what they would have been had appellant been a citizen instead of an alien enemy.

In Point IV an endeavor will be made to show that this assumption is justified.

Point V deals only with the proposition that the Peace Resolution and Treaties entered into since the taking have not deprived appellant of any rights to which the taking gave rise.

ARGUMENT

I

The taking of the ships was, in essence, an exercise of the power of eminent domain, possessed by every government over all property found within its dominions, regardless of its ownership, if it is required for public use.

The ships were either expropriated, or they were confiscated. The Court of Claims in its opinion

(R., p. 13, last par.) suggests a middle position, rested solely upon appellant's enemy status. It says: "We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States should at some time account for the vessels or their ascertained value." Neither the Joint Resolution authorizing the taking, nor the Proclamation accomplishing it warrants such a suggestion. If it is finally adjudged that the Court of Claims is without jurisdiction to entertain this suit, the effect of the adjudication, in a practical sense, will be that the ships were confiscated; because, while the owners could still apply to Congress for relief, action by Congress would be a matter of grace and favor—it is only in courts that rights can be asserted.

The middle position assumed by the Court below runs contrary to the law as expounded by this Court in *Brown v. U. S.* (1814) 8 Cranch 110 (see especially p. 125), which is to the effect, broadly speaking, that judicial decrees of a confiscatory character, or having a confiscatory result, can be entered only if authorized by some law existing at the time of the fact occurrences. The decision of the Court below embodies the untenable theory that into the decision of the case there may enter not only law existing at the time of the fact occurrences but law that may be enacted in future.

In support of the proposition that the ships were not confiscated, but were taken by way of eminent domain, appellant relies upon:

(a) The text of the Joint Resolution.

(b) The manner of the taking of the ships by the Executive Department.

(c) The debates in Congress at the time of the adoption of the Resolution.

(d) The utterances of executive officers of the Government then and since.

(e) The general public policy of the country, as disclosed by the writings of its statesmen and publicists, the decisions of its courts and the acts and declarations of its executive officers, all of which are of such a character as to warrant the observation that an intention on the part of the United States to confiscate enemy property will never be presumed, but, if claimed, must be clearly proven.

(f) Treaties at the time existing between the United States and Germany, and judicial decisions concerning the interpretation of Treaties. (The reference to the Treaties is merely for the purpose of showing one reason why Congress enacted a compensatory law and throwing light upon certain utterances by Congressmen and by the President. No right of action founded upon the Treaties is asserted.)

(g) The attitude of the United States respecting Articles 1 and 2 of the Sixth Convention adopted by the Second Hague Conference (1907).

These various sources of authority are analyzed or elaborated as follows:

I (a)

Inferences from text of Joint Resolution.

The text of the Resolution clearly indicates that property acquired by the United States under its provisions is to be paid for. This statement is supportable on several grounds.

First—The word "confiscation" is nowhere employed in the Resolution, nor is any word of like or similar meaning. This fact is of great weight when it is recalled that Congress, on the only occasion when it authorized the confiscation of enemy property, declared its purpose in express and clear terms. The reference is to the Act of July 17, 1862 (12 Stat. 589). This Act was entitled "An Act to suppress insurrection, to punish treason and rebellion, *to seize and confiscate the property of rebels,* and for other purposes." The body of the Act, in the most explicit language, authorized confiscation, *and declared it to be the duty of the President to set in motion the procedure provided by the Act, for effecting confiscations by judicial decree.*

Second—The manifest purpose of the Joint Resolution was to provide the United States with facilities if needed, by enabling the Government (a) to acquire "immediate possession and title" of any vessel affected by the Joint Resolution, and (b) to "operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise." (So far as coastwise service is concerned, the Resolution was necessary as an enabling measure. Without it these ships, being foreign-built, could not have been operated coastwise. See Act of August 18, 1914, c. 256, sec 1, 38 Stat. 698.) The President is not *directed* or *required* to take title. He is simply *authorized* to do so. So, also, he is simply *authorized,* not directed or required, to put the ships into service. If in the exercise of his judgment he had refrained from taking title, or, after taking title had refrained from

putting the ships into service, it could not be said that he had violated any mandate imposed upon him by Congress; so likewise if he had taken some ships and refrained from taking others (as a matter of fact the records show that he took some at one time and others not until a considerably later date.)

In all this it is apparent that the acquisition of facilities was the purpose in view, and not the infliction of injury upon the enemy—for had such been the intention the authority given the President would have been mandatory and not merely permissive.

Third—The powers granted by the Resolution are so broad as to apply not only to ships then enemy owned (i. e., German owned—we were not yet at war with any other nation), but to ships owned by the nationals of friendly neutrals, of governments associated with us in the war, and even by American citizens. The condition which subjected a ship to expropriation under the Resolution related to her ownership, flag or registry at the time she came into our jurisdiction (i. e., with regard to claimant's ships, July-August, 1914). *German ownership at that time of the smallest share or fractional interest subjected the whole ship in* 1917 *to the exercise of the powers granted the President by the Resolution, regardless of where the ownership might lie in* 1917. The same is true as to flag or documentation, regardless of ownership. If these were German in 1914 the ship was subject to expropriation in 1917, regardless of changes in flag or documents in the interim.

By way of showing the broad scope of applicability of this Joint Resolution, reference will be made to

certain illustrative instances. German ships coming here in 1914 were purchased by Americans in 1915 under authority of an act of Congress of August 18, 1914 (c. 256, sec. 1; 38 Stat. at L. 698), and put under American registry and sent out as merchant ships. (See Life and Letters of Walter H. Page, by Burton J. Hendrick, Doubleday, Page & Co., 1922, vol. 1, p. 392-394, referring to the "Dacia.") Such vessels as the "Dacia", had she not been captured as prize, as she was by the French before we entered the war, would have been subject to expropriation under the Resolution. In a case now before this Court there are involved three vessels taken under the terms of this Joint Resolution, although they had been American owned and under American registry and flag since 1913 (*Atlas Line S. S. Co. v. U. S.*, Oct. Term, 1925, No. 111).

The Austrian steamer "Martha Washington" was requisitioned on August 31, 1917, although no state of war then existed between the United States and Austria. Later (May 11, 1918) title was taken under the Resolution. The United States afterwards paid compensation for her use down to the date of taking title, although, for a part of the use period (*i. e.*, December 7, 1917—May 11, 1918) we were actually at war with Austria. See Record of Hearings before House Committee on Merchant Marine, 66th Congress, 3d Session, December 15, 1920, re bill H. R. 14985. See also Minutes of U. S. Shipping Board of April 16, 1920, for Resolution re Compensation for S. S. "Martha Washington," which is of such importance that it is quoted in full as follows: (Italics are counsel's.)

"Whereas, On August 31, 1917, the United States

Shipping Board requisitioned the vessel MARTHA WASHINGTON, a passenger steamship of 8312 tonnage, then owned by Cosulich Societa Triestina di Navigazione, a corporation organized in Trieste, Province of Litorale, Austria; and

"Whereas, At the time of said requisition, the MARTHA WASHINGTON *had Austrian registry and flew the Austrian flag,* and was lying at the port of New York; and

"Whereas, The said Cosulich Societa Triestina di Navigazione claims to be in fact an Italian Corporation, and seeks to have the said MARTHA WASHINGTON reconveyed and recover compensation for its use while under the jurisdiction of the United States; therefore be it

"Resolved, That at the time the MARTHA WASHINGTON was requisitioned said vessel had the status of a *neutral vessel subject to requisition* by the United States Shipping Board under the power delegated to said Board by the President of the United States, which authority was vested in the President by an act of Congress, the Board has no authority to reconvey the said vessel to the Cosulich Societa Triestina di Navigazione, regardless of whether or not said corporation may at the present time be entirely Italian in character and purpose; and be it

"Further resolved, That the *claimants be remitted to the State Department to establish their Italian citizenship as a* prerequisite to the delivery of the vessel and compensation therefor after May 11, 1918; and be it

"Further resolved, That the recommendations of the Requisition Claims Committee that the award

of compensation for the use of said vessel during the period it was in use under the Requisition Order of August 31, 1917—from August 31, 1917, to December 7, 1917, be fixed at $219, 436.80, from which should be deducted the cost of repairs effected by the United States Navy, and the time required to make same, and further, that *just compensation for the use of said vessel from December* 7, 1917, *until the United States took over possession and title of said vessel on May* 11, 1918, *in accordance with Executive Order No.* 2859-*A be fixed at* $352,013.20, be, and they are hereby approved; and be it

"Further resolved, That the Disbursing Officer of the United States Shipping Board be, and he is hereby authorized *to pay the amount awarded to the claimant* upon securing the consent of the Alien Property Custodian thereto; and be it

"Further resolved, That pending receipt of information from the Navy Department with respect to the cost of the repairs and the time required to effect the same, the claimant be required to guarantee the payment thereof; and that the State Department be advised of this guarantee in order that it may be enforced before redelivery of the MARTHA WASHINGTON is effected, in the event the claimant establishes his right thereto."

This situation is referred to at such length for the support it lends to the following observations:

(a) The fact that the Resolution authorized the United States to take title to neutral, allied and American-owned and registered vessels, no less than German-owned vessels, leads inevitably to the conclusion that it was intended that vessels taken should be paid for. It is impossible to hold that Congress

intended to authorize the taking of the ships of a neutral, an ally or a citizen without compensation. It is equally impossible for the court to apply one rule to the ships of such persons and another rule to enemy ships. To make such a distinction would lie only in the power of Congress, and Congress has laid down one rule for all.

(b) The Executive Department of the Government has recognized that no distinction was made between enemy and non-enemy ships, in paying the sum of $352,000 for the use of the Austrian ship, "Martha Washington," from the date of the declaration of war with Austria on December 7, 1917, to the date when title to the ship was taken on May 11, 1918. (See Shipping Board Resolution, *supra.*)

(c) Recognition of the right of the owners of the "Martha Washington" to be paid compensation for her use during that part of the period of the war with Austria that preceded the taking of title, constitutes an admission of their right to recover compensation for the property of which they were deprived when *title* was taken. Reason and justice do not justify taking a *title* without compensation, when the right to be compensated for *use* prior to the taking of title is recognized. Of course, also, if Austrian enemies are entitled to be compensated, German enemies are equally entitled. No ground exists for distinguishing between the two, and if power to make an arbitrary distinction may be claimed to exist anywhere, it could be only in Congress, which has not attempted any distinction.

One feature of the Martha Washington case deserves special mention. It was admitted that the ship was of Austrian flag and registry, that the cor-

poration owning her was an Austrian corporation and that its managing directors and majority stockholders were Austrian subjects. It was asserted, however, that the corporation was organized and controlled "by those who were of Italian blood and Italian sympathy, although underlying that they were subject to the domination of Austria until this portion of Italia Irredenta was redeemed" (Report of House hearing, *supra*, especially page 5; Shipping Board Resolution, *supra*). The Shipping Board resolution shows that this claim was treated as immaterial in the making of the award for compensation. The Resolution orders: "that the claimants be remitted to the State Department to establish their Italian citizenship as a prerequisite to the delivery of the vessel and compensation therefor after May 11, 1918" (i. e., after date of taking title). And, entirely disregarding this claim and dealing with the steamer as an Austrian vessel, the Board found: "that just compensation for the use of said vessel from December 7, 1917," date of declaration of war against Austria) "until the United States took over possession and title of said vessel on May 11, 1918, in accordance with Executive Order No. 2859-A be fixed at $352,013.00***." That is to say, the Board awarded compensation for the use of the vessel during that part of the Austrian war period which preceded the taking of title, although conceding that she was an Austrian —hence, enemy-owned ship.

(No distinction exists between a "requisition" and a "condemnation." Judge Smith in U. S. District Court for the Eastern District of South Carolina in *Filbin Corporation v. United States,* 266 Fed. Rep. 913, referring to the language of the Fifth Amendment said:

"Nothing is said about 'requisition' or 'condemnation'; the word used is 'taken.' The result of either condemnation or requisition is *a taking,* and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation; and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of the public, and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation.")

Fourth—Sec. 2 of the Joint Resolution reads as follows:

"Sec. 2. That the Secretary of the Navy be, and he is hereby authorized, and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

This affords conclusive evidence of an intention to pay compensation. If not, why provide for appraising the vessels? Why give to the appraisal the char-

acter of "competent evidence in all proceedings on any claim for compensation?" Why, when Sec. 1, authorizing takings, is permissive only, should Sec. 2, providing for valuation, be *mandatory,* unless Congress intended that the permissive authority, if availed of, should give rise to a corresponding right to compensation?

Fifth—That the obligation is an implied rather than an express one does not detract from its strength. The approach of the war emergency was productive of other legislation authorizing seizure of property for public use that did not expressly call for payment but under which, nevertheless, compensation was paid. The immense payments made by the Government for the use of the railways during the war afford an example. The possession, operation and control of the railway systems of the country was taken over by the Government from about January 1, 1918, to March 1, 1920, under an Act of Congress which contained not a single word relating to compensation. The act reads (Act of August 29, 1916, 39 Stat. at L. 645):

> "The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

It is true that legislation passed at a later date did promise compensation and afford a measuring stick

to determine its amount and (as the Court below remarked, Op., R. 12) a forum in which to enforce payment. But *A. W. Duckett & Co., Inc. v. U. S.*, 266 U. S. 149, demonstrates that a right, a measure, and a forum existed without this later legislation. The property that formed the subject matter of the *Duckett* case was taken under the Act cited and the later legislation (Act March 21, 1918, 40 Stats. 451) did not apply to property of that kind, but only to railroads, nevertheless this Court held that Duckett & Co. had both a right and a forum.

Comparison with other legislation of the war period demonstrates that when Congress intended to refrain from committing the country to any obligation of payment, it did not lack the faculty of expressing such intention clearly. The Trading with the Enemy Act of October 6, 1917 (40 Stat. at L. 423, at 424; Fed. Stat. Ann., Sup. 1918, p. 862, at 863, sec. 12), provides (last par. of sec. 12) that

> "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

By this provision Congress reserved to itself the right to deal with the great mass of enemy property ashore, passing to the Government under the Act of October 6, 1917, in the light of the developments of the war and of conditions existing at its close.

The omission of a similar reservation with respect to the values of the seized ships, although it was expressly directed that they should be appraised, is significant, as indicating that Congress advisedly framed

the ship measure in such manner as to make it carry an obligation to compensate.

These arguments had no effect upon the Court below, because, in its view (Opinion, R. 9, 3d par.) "Manifestly the Joint Resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water."

It is respectfully submitted that this statement only begs the question, and that it is not supported by reason. In the attempt to ascertain the character of any legislative act, the first thing to be done is to examine the act itself. The Joint Resolution in question *negatives* rather than *manifests* the theory that it constitutes an exercise of the war power or finds support in the constitutional provision relating to declarations of war and rules concerning captures. It does not speak of confiscation. It does apply to ships which at the time of its passage were not owned by enemies, and with regard to all the ships affected by it, including those enemy owned, it required an appraisal of value, which is to be "considered as competent evidence in all proceedings on any claim for compensation."

The Court below supports its observation that the Joint Resolution was an exercise of the war power by reference to cases in which this Court has held that the Trading with the Enemy Act was an exercise of the war power. But no true analogy exists between this Joint Resolution and the Trading with the Enemy Act. The Trading with the Enemy Act, as originally conceived, was purely a conservation measure, and sales of property taken under that Act were per-

mitted only to prevent waste. When, later, by amendment, sales were authorized in any case, the Act still remained a conservatory measure with respect to the proceeds arising from such sales. The Court below said that if the ships had not been taken under the Joint Resolution they "could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." *True, but neither would there have been any title in the United States;* and had a sale subsequently taken place, whether the United States or another were the purchaser, the money realized at the sale would, under the Trading with the Enemy Act, have had to be deposited with the Alien Property Custodian or with the Treasurer of the United States, and in such custody would have been the property of the ship owner, subject only to the reservation contained in Section 12 of the "Trading with the Enemy Act, set forth above.

Moreover, the Trading with the Enemy Act was not passed until October 6, 1917, while the ships were taken in June, 1917.

I (b)

The manner of the taking of the ships by the executive department of the government demonstrates that the taking was an expropriation, not a confiscation.

The taking was in strict accord with the provisions of the Joint Resolution of May 12, 1917. The President issued a Proclamation (See supra, p. 6) quoting the Joint Resolution, reciting the presence in our waters of ships to which its terms applied, and

ordering them to be "taken over" to the United States in possession and title, agreeably to the terms and "to accomplish the purposes" of the Joint Resolution. This negatives the possibility that any other source of power was relied upon than the Joint Resolution itself. Moreover, it is in harmony with ordinary eminent domain procedure in those states wherein, under the law, taking may precede payment, and due process of law is accorded the former owner by provision for notice to him, either actual or constructive, and his being given a right to maintain a suit against the public body to which title has passed, to establish and recover just compensation.

1 (c)

The debates in Congress prove that it was not by inadvertence, but by intention that the Joint Resolution was enacted in a form that created an obligation to pay compensation for the property rights of which the ship-owners might be divested.

The Court below, in its opinion, did not refer to the Debates. It did refer to the fact that, in course of passage, the Joint Resolution was reduced from one of five sections, the last three of which contained provisions relative to suits by the ship owners, to the one of two sections which was finally passed, and it said (Opinion, R. 13): "The Joint Resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize suits

in the Court of Claims on account of the seizure of these vessels." *But this reasoning is deprived of force by the fact that the statements made in the debate in the House were made after the amendment to which the Court of Claims thus referred; and it was of the Resolution in the form in which it was finally passed that members of the House said that it gave the ship owners a right to sue in the Court of Claims and that they must and would be paid.* The Debates in the House were on Senate Joint Resolution 42 (of 2 sections) substituted by amendment for House Joint Resolution 62 (of 5 sections). Congressional Record, Vol. 55, Pt. 2, p. 1900.

Believing that such an arrangement will better serve the Court's convenience, printed extracts from the debates on the Joint Resolution are printed as appendix A to this brief, and at this point are printed only short quotations.

Mr. Rowe of New York, speaking of the seizures authorized by the Joint Resolution, said (Cong. Rec. May 7, 1917, Vol. 55, p. 1919):

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take real estate in my State and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.
>
> *"There is no man in this House today that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will*

be paid. We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government *before this war is closed.*"

Mr. Stafford of Wisconsin said (*Ibid,* p. 1919):

"I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships; but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships."

Mr. Stafford also said (*Ibid, p.* 1919):

"That principle is akin to that providing compensation for these interned ships; that being interned here, the owners not having the privilege of leaving port except by rushing into the jaws of destruction, are entitled to have their rights conserved and recognized in the courts of this country. And I make this claim, that if Germany accords our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accords them reciprocal rights, then these foreign subjects, upon the seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property."

Mr. Bankhead of Alabama interrupted Mr. Stafford (*Ibid, p.* 1920) to ask whether the Joint Resolution involved a denial of the principle that compensation should be paid. Mr. Stafford replied (*Ibid,* p. 1920):

"The bill provides, in section 2, for the means whereby the Secretary of the Navy may

appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas remarked (*Ibid*, p. 1921):

"This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen, and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

Mr. Small of North Carolina said (*Ibid*, p. 1922):

"I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time."

Mr. Edmonds of Pennsylvania remarked (*Ibid*, p. 1923):

"We take the ships. We have arranged to leave the question of compensation open. The treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in the Courts of Claims, where they have a right to take it."

* * * * *

> "I think we can afford to pass this resolution and leave it to the court to pass upon in due time what we are to pay for these ships."

Mr. Hadley of Washington, speaking of the appraisal provided for by Sec. 2, said (*Ibid*, p. 1924):

> "It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution."

Concerning all that was said in the House, as printed in Appendix "A" hereto, it is believed to give full support to the following propositions:

(a) That Congress *intended* that the ship owners affected by the Joint Resolution, enemy no less than neutral, should be compensated for their seized ships.

(b) That the opinion was held, with practical unanimity, that the Resolution as passed gave rise to an absolute right to compensation.

(c) That the House evidently believed that the Joint Resolution, without anything more, was sufficient to give the Court of Claims jurisdiction, and to give the ship-owners access to that Court, once the war should be over; despite the Senate's excision of the last three paragraphs of the original House Resolution.

I (d)

President Wilson, a member of his cabinet, an official of the State Department under his administration, and also former Secretary of State Hughes, acting in a private capacity, have all given utterance to statements which stamp the Joint Resolution as one which imposed upon the government the obligation to pay compensation.

In his War Message of April 2, 1917, the President said:

> "We have no selfish ends to serve. We desire no conquests, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make.

President Wilson also said that:

> "The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title." (Garner's International Law I, p. 168).

On April 12, 1917, Secretary of the Interior Lane wrote to Mr. Frank I. Cobb, Editor of the New York World, as follows:

> "I am in favor of taking all the German ships under requisition, paying for their use eventually, but this is a matter of months." (See the letters of Franklin K .Lane, Houghton Mifflin Company, 1922, p. 245).

And on April 15, 1917, he wrote to his brother George W. Lane:

> "We, of course, are going to press into service at once the German and Austrian ships, such of them as can be repaired and will be of use in the freight business, but we will not confiscate them. We will deal with them exactly as we will deal with American ships, paying at the end of the war whatever their services were worth. This spirit of fairness is to animate us throughout the war." (*Ibid*, p. 246.)

The development from the Cabinet Minister's proposal of April to Congress' Act of May is interesting. Mr. Lane proposed *a requisition for use, with compensation,* which finds clear authority in Articles 1 and 2 of the Sixth Hague Convention (infra Ig,) Congress finally decided upon and enacted an eminent domain measure which resulted in the acquisition of title instead of the mere temporary right to use, and, of course, involves legal obligation to pay compensation.

The Department of State, over the signature of Van S. Merle-Smith, and under the date of December 8, 1920, addressed to Senator Lodge, Chairman of the Foreign Relations Committee of the Senate, a letter relating to the Austrian steamship "Martha Washington." This letter was used by the Hon. Charles E. Hughes, afterwards Secretary of State, in his argument addressed to the House Committee on the Merchant Marine and Fisheries, 66th Congress, 3d Session, December 15, 1920, as counsel for the owners of the former Austrian S. S. "Martha Washington" and is printed in full in the record of said hearing. In this letter Mr. Merle-Smith said:

> "The joint resolution of May 12, 1917, which authorized the seizure of the vessel, contemplates the payment of compensation."

The record of the above-mentioned hearing also contains on p. 17 the following colloquy between Mr. Hardy of Texas, a member of the Committee, and Mr. Hughes.

> "Mr. Hardy—* * * As I understand it, under international law, the private property, and justly so, of a private citizen of a country

which may get into war with us, is really sacred.

"Mr. Hughes—And ought to be."

I (e)

From the beginnings of the United States until the present time, its public policy, with regard to the treatment of enemy property, has been such that an intention to confiscate can never be presumed, but, if alleged, must be clearly shown to exist.

During the Revolution the Continental Congress did not enact any confiscatory measures. Some of the States did. The Treaty of Peace between the United States and Great Britain, of September 3, 1783 (Treaties and Conventions Between the United States and Other Powers, Government Printing Office, 1889, p. 375), provided that Congress should recommend to the Legislatures of the several States to provide for the restitution of all property rights of British subjects that states had confiscated. Some years later the United States concluded the Jay Treaty with England, and the treatment of enemy property became the subject of widespread public discussion. In this Alexander Hamilton was the leading protagonist of the view that enemy property should not be subjected to confiscation. Hamilton wrote his "Camillus Letters" about 1795, principally for the purpose of persuading the country to adopt, for that time and the future, the policy of extending protection to the property of aliens found within our borders if by the accident of circumstance our Government and theirs should come to be at war. From the "Camillus Letters" is quoted the following:

"XVIII. No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation.

"It would have been an inestimable gem, in our National Constitution, had it contained a positive prohibition against such a practice, except, perhaps, by way of reprisal, for the identical injury on the part of another nation.

"There is, indeed, ground to assert, that the contrary principle would be repugnant to that article of our Constitution which provides, that 'no State shall pass any law impairing the obligation of contracts.' The spirit of this clause, though the letter of it be restricted to the States individually, must, on fair construction, be considered as a rule of the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war. But it is a pity that so important a principle should not have received an express and direct sanction.

"XIX. The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there; it tacitly promises protection and security.

"There is no parity between the case of the persons and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice;

there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscaton of a property, which, during peace, serves to augment the resources and nourish the prosperity of a state?

"The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?"

The country's early jurists were equally outspoken against the policy of confiscation.

In *Brown v. U. S.*, 8 Cranch, 110, Chief Justice Marshall, while admitting that the sovereign (that is to say, in our country, the Congress) had the power to pass confiscatory measures, did not refrain from condemning the exercise of the power. Concerning it he says (p. 128 of 8 Cranch).

> "* * * The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although *it cannot be disregarded by him without obloquy,* yet it may be disregarded." * * * (Italics counsel's.)

In the same case, Mr. Justice Story wrote a dissenting opinion, but on the point in question, of the evil policy of confiscating enemy property, he was in agreement with the majority of the Court. Referring to the "Camillus Letters," Nos. 18 to 23, Judge Story says (p. 141 of 8 Cranch):

> "* * * I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, *but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable.* He proves incontrovertibly what the highest interest of nations dictates with a view to permanent policy; but I have not been able to perceive the proofs by which he overthrows the ancient principle," (that is, that enemy property was formerly subject to confiscation).

He further says (p. 145 of 8 Cranch):

"* * * I am not bold enough to interpose a limitation where Congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. *This, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced that nothing but an express act of Congress would satisfy my mind that it ought to be included among the fair objects of warfare.* * * * " (Italics counsel's).

(N. B. The majority opinion held that *Congress alone, not the President,* has the power in any case.)

And Chief Justice Marshall, speaking for the majority in the *Brown* case, asserts that there is no distinction in reason between debts and credits and other forms of property. At p. 123 of 8 Cranch he says:

"Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction."

Brown v. U. S. was decided in 1814. The case of *Percheman v. U. S.* came before the court in 1833 and again the majority opinion is written by Marshall, and in it he says, concerning the results upon private property of the transfer of dominion:

"It may not be unworthy of remark that it is very unusual, even in case of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the

country. *The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.*" (Italics counsel's) (*U. S. v. Percheman*, 7 Peters 51, at foot of p. 86).

It is submitted that this remark applies with at least equal force to the idea of the confiscation of ships that took refuge from the enemy in the ports of a country then a neutral, but which afterwards became a belligerent, and the more so as there existed between the two governments a Treaty providing that "If the citizens or subjects of either party, in danger from * * * enemies, shall take refuge, with their vessels or effects, within the harbors or jurisdiction of the other, they shall be received, *protected*, and treated with humanity and kindness * * *" (Art. XVIII of Treaty with Prussia of 1799, infra p. 40).

At the present stage of the argument the *Brown* and *Percheman* cases are referred to solely for the support they give to the proposition that the *policy* of the United States is so opposed to confiscation that he who claims that confiscation is intended in a given case is put upon proof to support his claim.

Professor John Bassett Moore, at p. 308 of Vol. 7 of his Digest of International Law, after reviewing numerous authorities, says:

> "Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> " 'Property belonging to an enemy which

is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, *may be said to enjoy a practical immunity from confiscation.'"* (Italics counsel's).

In further support of the proposition that confiscation is not to be presumed, we quote the following extract from the speech delivered by Secretary of State Hughes at Philadelphia on November 30, 1923. Mr. Hughes, referring to Latin America, said:

"States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws.

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful co-operation is possible.

"Each State may have its code of laws in accordance with its conception of domestic policy, *but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles.*" (Italics counsel's.)

In the concluding paragraph the Secretary only repeats in other words the thought expressed by

Hamilton when ("Camillus Letters" XVIII) he denounced:

> "The idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation."
>
> And when ("Camillus Letters" XIX) he asserted that:
>
> "Whenever, therefore, a Government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security."

Attorney General Daugherty in 1923 uttered officially the opinion that confiscation is contrary to the policy of the United States. From his brief in *U. S. v. Chemical Foundation* (District Court, Delaware, 1923, 294 Fed. 300) the following extracts are quoted:

> "* * * Confiscations of the private property of the enemy have met the universal disapprobation of the civilized world for nearly two hundred years." (p. 156.)
>
> "9. It is to be presumed that Congress, by the amendment of March 28 (to the Trading with the Enemy Act), did not intend to violate the 'law of nations' by authorizing confiscation of enemy property, unless the act clearly so directs." (p. 196).
>
> "That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized." (p. 198.)

> "With the growth of Christianity, the practice of enslaving the defeated enemy gradually disappeared, but the practice of seizing his property continued. It early developed that the seizure must inure to the benefit, not of the individual members of the victorious army, but to the sovereign power of the nation. Then with the growth of commercial intercourse and with the progress of civilization, the idea that both the person and the property of the individual enemy was free from confiscation, although both might be arrested or impounded as a measure of safety during the war developed." (p. 202.)
>
> "* * * The policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the miltary zone in time of war." (p. 574.)

And to demonstrate that the confiscation Acts of the Civil War period, properly understood, do not contradict the assertions just quoted, the Attorney General said (*Ibid.* p. 204):

> "* * * The purpose of all these acts was to punish American citizens for acts of disloyalty, and although they were later sustained on the doctrine of seizure of enemy property, the legislation cannot be cited as a precedent for confiscation of enemy property during the war just ended."

The public policy evidenced by this mass of authority is set at naught by the Court below disclaiming jurisdiction, although refusing (Opinion, Record p. 13, last par.) to adjudge the Joint Resolution a confiscatory measure. Earlier in the opinion (Rec-

ord p. 9, first par.), it had justified its disclaimer of jurisdiction by saying that the Joint Resolution "does not in terms declare a liability of the Government or of itself create a right in plaintiff." It is clear, however, especially since the decision of this Court in *A. W. Duckett & Co., Inc. v. U. S.* 266 U. S. 149, that an Act may create a right in plaintiff and vest jurisdiction in the Court of Claims without *"in terms* declaring a liability of the Government." The Act involved in the *Duckett* case neither promised compensation nor conferred jurisdiction on the Court of Claims, but this Court held that a taking pursuant to the Act created a right to compensation of which the Court of Claims must take cognizance under Section 145 of the Judicial Code.

1 (f)

A compelling reason for Congress to enact a compensatory measure is found in the treaties existing in 1917 between the United States and Germany, and the decisions of the Supreme Court relating to the effect of war on treaties, in that these show that good faith required the payment of compensation.

(The Treaties are referred to, not as a foundation for the suit, but only to show a reason why Congress legislated in such manner as to give a right of action.)

Article XII of the Treaty of Commerce and Navigation between the United States and Prussia of 1828 (Treaties and Conventions of the United States and Other Powers, Government Printing Office, Washington, 1889, p. 915) revives Articles XIII to XXIV, inclusive, of the Treaty of 1799 with Prus-

sia (*Ibid*, p. 917), with the exception of the last paragraph of Article XIX, which is not pertinent to this discussion.

Among the Articles of the Treaty of 1799 thus revived are the following:

"ARTICLE XVIII.

"If the citizens or subjects of either party, *in danger from* tempests, pirates, *enemies,* or other accidents, *shall take refuge, with their vessels or effects,* within the harbors or jurisdiction of the other, they shall be received, protected and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions and other things necessary for their sustenance, health and accommodation, and for the repair of their vessels. (Italics counsel's.)

"ARTICLE XXIII.

"If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance; and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages or places, *and in general all others whose occupations are for the common subsistence and benefit of mankind,* shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted

by the armed force of the enemy, into whose power by the events of war they may happen to fall; *but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.* (Italics counsel's.)

"ARTICLE XXIV.

"* * * And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be sacredly observed as the most acknowledged articles in the law of nature and nations."

The German Empire succeeded to the rights and duties of Prussia under these treaties.

North German Lloyd v. Hedden 43 Fed. R., 17, *Disconto Bank v. Umbreit,* 208 U. S. 570; 52 L. Ed. 625; *Terlinden* v. *Ames,* 184 U. S. 270; *Foreign Relations* 1883, p. 369; *Ibid* 1885, p. 404 at 443-4; *Ibid* 1887, p. 370; *Ibid* 1895, pt. 1, 583. *American Journal of International Law,* Vol. IX (1915), p. 952.

Under the decisions of this Court these treaties were not abrogated by the outbreak of war with Germany. In *Society, etc., v. New Haven,* this Court declared (p. 494 of 8 Wheaton).

"There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, *or which, in their terms, are meant to provide for the event*

> *of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.*" (Italic counsel's.)

And further:

> "We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended, while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

And in the same case the Court also held that even if a treaty is abrogated, private rights previously vested under it are not thereby destroyed or impaired.

In the case cited the Society was a British corporation and its rights to certain lands in Vermont were recognized and confirmed by the provision of the Treaty of Peace between this country and Great Britain, following the Revolution, which is cited in a subsequent part of this brief. Later an effort was made to divest it of these lands under a State statute, and it was contended that as a result of the War of 1812 the Treaty of 1793 was abrogated in certain respects, including those provisions under which the Society asserted its vested property rights. This Court states the contention and answers it in the following words (p. 492 of 8 Wheaton):

> "The last question respects the effect of the late war between Great Britain and the United States, upon rights existing under the treaty

> of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent."

Here the Court states an argument not germane to the present case and then proceeds:

> "But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it.
>
> "If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more effects such rights than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents, be repealed, it has never been supposed that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests."

This reasoning applies no less to property in ships than to property in land.

Congress knew, when it was debating the Joint Resolution, and the President knew when he announced that the United States would not take advantage "of a state of war to take possession of property to which international understanding and the recognized law of the land give it no just claim or title" that the treaties and the decisions just referred to existed. They knew that the treaties

guaranteed to the German shipowners protection for their vessels which had sought refuge in our ports (neutral at the time they entered) from an enemy. They knew that the shipowners, whose business of transporting persons and goods to and between all places on the face of the earth had always been considered an "occupation for the common subsistence and benefit of mankind" were entitled to freedom from molestation and compensation for anything necessary to be taken from them for the use of armed forces. They knew that this Court had declared that such a Treaty as this, providing for the very event of war, was sacredly binding, should that event occur; and that even if it were treated as abrogated, the private rights previously acquired by private persons in reliance upon its terms were not thereby affected. This knowledge explains the compensatory character of the Joint Resolution.

The strict interpretation which this Court in *Stoehr v. Wallace,* 255 U. S. 239, gave to that phrase of Art XXIIIof the Treaty of 1799 referring to "the merchants of either country *then residing in the other*" does not impair the force of the argument, for two reasons: first, the argument goes only to the intention of Congress, and the debates show that the intention was to pay for the ships after the war should be over (See Ic, supra); second, a separate and substantive provision of Art. XXIII includes ship owners in the general clause * * * " all others whose occupations are for the common subsistence and benefit of mankind", as to whom it is provided that "if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price." So does

Article XVIII specifically protect those who take refuge, with their vessels, in our harbors, from enemies.

I (g)

The American attitude relative to articles 1 and 2 of convention VI of the Second Hague Conference (1907) likewise called for the enactment of a compensatory measure, in order that acts should square with professions.

The Articles mentioned read as follows:

"*Art.* 1—When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Art. II—A merchant-ship unable, owing to circumstances of *force majeure,* to leave the enemy port within the period contemplated in the above Article, or which was not allowed to leave, cannot be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation."

(Foreign Relations of the U. S. 1907, Part 2, p.

1248; American Journal of International Law, 1908, Vol. 2, p. 128).

Had this Convention been adopted by the United States, it would have insured appellant's ships against confiscation, and would have insured the payment of compensation had they been requisitioned for use—for it may not be assumed that our Government would have violated the obligations of this Convention after once adopting it.

The United States, however, did not adopt this Convention. Our delegates* declined to sign it or to recommend its acceptance and it was never ratified by the Senate. The reason is stated in the Report of the American delegation to the Secretary of State (Foreign Relations, 1907, Part 2, 1144 at p. 1158). It is that the Convention did not go as far as the American delegation thought international law had already gone. The report states (in part):

> "The uninterrupted practice of belligerent powers since the outbreak of the Crimean war has been to allow enemy merchant vessels in their ports at the outbreak of hostilities to depart on their return voyages. The same privilege has been accorded to enemy merchant vessels which sailed before the outbreak of hostilities, to enter and depart from a belligerent port without molestation on the homeward voyage. *It was therefore the view of the American delegation that the privilege had*

*Joseph H. Choate; Horace Porter; Uriah M. Rose; David Jayne Hill. (American Minister at the Hague); Brig. Gen. Geo. B. Davis; Rear-Admiral Charles S. Sperry; William I. Buchanan; James Brown Scott; Chas. Henry Butler; Chandler Hale, Secretary; A. Bailly-Blanchard, Assistant Secretary; William M. Malloy, Assistant Secretary.

acquired such international force as to place it in the category of obligations. Such, indeed, was the view of a majority of the conference, but as the delegation of Great Britain adhered to the opinion that such free entry and departure was a matter of grace, or favor, and not one of strict right, the articles regard it as a delay by way of favor and refer to the practice as desirable." (Italics counsel's.)

And also:

"The convention also presents an undesirable alternative in the treatment of enemy merchant ships, in that it provides that in certain cases they may be seized 'subject to restoration after the war without indemnity' or to 'immediate requisition with indemnity.' As merchant marine commerce is carried on it is obvious that the condition of the cargo which is detained in indifferent or inefficient custodianship during the ordinary duration of war would approach confiscation."

The correctness of the view thus expressed by the American delegation is maintained in an article entitled "Status of Enemy Merchant Ships" contributed by Dr. James Brown Scott, technical delegate and expert in International Law of the American delegation, to the American Journal of International Law (Journal, 1908, Vol. 2, p. 259), wherein is set forth in detail the practice of the principal European powers in all their wars from that of the Crimea onward, as well as of the United States in the Spanish war.

Dr. Scott says (*Ibid,* p. 266):

"It is thus seen that in no less than five great wars of the last fifty years an exemption is

made in favor of enemy merchant vessels in port at the outbreak of hostilities, and that a longer or shorter period is fixed within which such vessels may safely leave their ports and proceed to their destination. Although the custom is modern, it cannot be said to be limited to any particular quarter of the world; for the states generally have recognized the exemption in these recent wars, not only in Europe and America, but also in Asia. Such a custom, however recent it may be, may rightly claim to form a part of the law of nations. It is therefore a source of regret that the Second Peace Conference refused to recognize it as a right but simply as a privilege, *a delai de faveur,* which may be accorded or refused at the option of the belligerent, and that the privilege was unaccompanied by any recommendation of a period of time within which the privilege in question should be accorded."

He concludes with this remark (*Ibid,* p. 270):

"The convention as a whole was a compromise between those who believed in the existence of a right and those who refused to recognize the legal validity of the custom which has grown up in recent years. As in most compromises the result is unsatisfactory. The convention cannot be called progressive, for it questions a custom which seems generally established and its adoption would seem to sanction less liberal and enlightened practice. The United States delegation therefore refused to sign the convention and its acceptance has not been recommended by the Department of State."

That our official delegates held such a view and our State Department approved it, would seem to

afford a sufficient reason for the enactment of a compensatory measure, especially as our Government had announced a sincere intention to wage war in accordance with the rules of International Law.

Recapitulation of Argument Under Point I.

The measures employed in taking title to these ships were, in their essence, of the character of eminent domain. This is established by the language of the Joint Resolution; the language of the proclamations evidencing the takings; the statements made in debates in Congress at the time of the passage of the Joint Resolution; the utterances and acts of executive officers of the Government then and since; and the policy of the country as disclosed by its political and judicial history extending from its foundation to the present day. A powerful reason for enacting a compensatory, rather than a confiscatory, measure is found in our Treaties with Prussia and in a proper desire to act in accordance with the principles we professed at the time of the Second Hague Conference.

II.

The taking having been by way of eminent domain, the owners are entitled as matter of law to compensation, the right finding support in the Constitution (Amendment V), in the Joint Resolution, and in the theory of express contract.

As to strict eminent domain proceedings.

When a taking of private property for public use is effected by formal eminent domain proceedings,

the right to compensation springing out of the taking is founded upon the Constitution. *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312; *Seaboard Air Line Railway Company v. U. S.* (1923), 261 U. S. 299.

In the *Monongahela Nav. Co.* case the statute authorized the taking of plaintiff's land, dam and lock, necessary to the exercise of its franchise to take tolls, but expressly provided that—

> "In estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated."

The trial court, in obedience to the statute, declined to admit evidence of the value of the franchise. This Court, holding that Congress lacked power to say "what shall be the rule of compensation," reversed the judgment and sent the case back for a new trial, in which the value of the franchise should be taken into account, saying, (at top of p. 328 of 148 U. S.):

> "We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

and also, (last par. of p. 336 of 148 U. S.):

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms

than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation."

In the *Seaboard Air Line Railway Company* case the question before this Court was whether the United States had to pay interest on the value of lands condemned under the Lever Act* and taken

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*Act of Congress approved August 10, 1917 (40 Stat. at L. 276).

"Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies; Provided, That nothing in this section that follows, shall be construed to require any natural person to furnish to the government any necessaries held by him and reasonably required for consumption or

prior to ascertainment and payment of compensation. Section 177 of the Judicial Code forbade the allowance of interest on claims against the United States. This Court, speaking by Mr. Justice Butler, held that "just compensation is provided by the Constitution and the right to it cannot be taken away by statute."

Reason supports the conclusion that the method by which appellant's ships were taken amounted in law to formal eminent domain procedure, the Proclamation of the President serving the purpose of effecting a transfer of title and affording record evidence of the transfer, just as does the report of commissioners, filed in a public office, in the more familiar modes of practice obtaining under state laws. And on the authority of the two cases last discussed, it is submitted that the right to compensation to which this taking, thus formally accomplished and evidenced, gave rise, is founded on the Constitution. The failure of the Joint Resolution of May 12, 1917, to expressly promise payment, no more impairs the constitutional right to be paid than did the silence of the Lever Act as regards the payment of interest defeat the claim for interest in the *Seaboard Air Line Company* case; nor the express exclusion of the franchise in the *Monongahela Nav. Co.* case defeat a recovery for its value.

The question presented is quite otherwise than it would have been if, the owner of these ships being an

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use by himself and dependents, nor shall any person, firm, corporation or association be required to furnish to the government any seed necessary for the seeding of land owned, leased or cultivated by them."

alien enemy, Congress had said, "payment shall *not* be made." The question has relation only to the consequences arising from the omission of an explicit direction to pay, and it is submitted that in those circumstances the Constitution requires payment to be made and the claim may therefore be said to be founded upon the Constitution.

As to whether or not the claim is "founded upon a law of Congress" refinements of reasoning will not be attempted. The result will be the same whether its foundation be a statute or the Constitution or implied contract. Therefore, for the statutory foundation only this is claimed: That the Joint Resolution was on the statute books, and the Proclamations effecting the change of title were in terms based upon the Joint Resolution; whence it follows that the taking cannot be called a tort, nor can it be called a capture under the laws of war—either the general laws of war or any particular measure in force in the late war, except the Joint Resolution itself—and that was an enactment that had effect upon ships owned by citizens equally with those owned by enemies, and that required, as to enemy ships no less than others, an appraisal of value which should be "evidence in all proceedings on any claim for compensation."

The conclusion of the Court below that the action was not founded upon a law of Congress seems to have been based in part upon the view that statutes do not impose liability unless they "in terms" purport to do so. But when a statute, recognizing ownership to be in another, authorizes the United States to take property for public use, action under that statute imposes liability even though the statute "in terms"

denies that liability shall arise. *Monongahela Nav. Co. v. U. S.* (supra). And mere silence on the question never exonerates the Government from liability. *A. W. Duckett & Co., Inc. v. U. S.* (supra).

To further support its conclusion that this action is not founded upon a law of Congress, the Court of Claims said (Opinion, Case p. 13):

> "If this Resolution can be made the basis of the suits, they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant?"

This reasoning overlooks a rule relating to the civil rights of enemies which is stated by this Court (quoting from Chitty) in *Hanger v. Abbott* (1868), 73 U. S. 532, in the following words:

> "We preclude him (an enemy) during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy."

A masterly exposition of this rule is found in *Robson v. Wall* (1820), 2 Nott & M. (S. C.) 498. The Court of Claims itself applied the rule in *Sierra v. U. S.*, 9 Ct. Cls. 224, quoting from *Hanger v. Abbott* as follows:

> "Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability and opens the doors of the courts."

And in the case cited the Court of Claims gave the plaintiff "the full benefit of this exposition of the law," although the petition showed him to have been an alien enemy during the Civil War.

As to Quasi-eminent Domain Proceedings.

When a taking is effected by proceedings "in the nature of" or "as in" eminent domain, it gives rise to a right to compensation based upon implied contract. *U. S. v. Great Falls Mfg. Co.* (1884), 112 U. S. 645; *U. S. v. Lynah* (1903), 188 U. S. 445; *U. S. v. Buffalo Pitts Co.* (1914), 234 U. S. 228; *U. S. v. North American Trans. & Trading Co.* (1920), 253 U. S. 330; *A. W. Duckett & Co., Inc. v. U. S.* (1924) 266 U. S. 149; *Campbell v. U. S.* (1924), 266 U. S. 368.

In *U. S. v. Great Falls Mfg. Co.* the plaintiff recovered judgment in the Court of Claims for the past and future use and occupation by the United States of certain lands owned by the plaintiff and taken possession of by the United States in the execution of a plan for supplying the city of Washington with water. The United States did not assert any title to the lands. The lands were occupied by a dam or its abutment, constructed pursuant to an act of Congress. The Government commenced, but later abandoned, proceedings to condemn the lands, and simply took and held possession without acquiring title. Mr. Justice Harlan, speaking for this Court in affirming the judgment in favor of plaintiff, says (foot of page 656 of 112 U. S.):

> "* * * we are of opinion that the United States, having by its agents, proceeding under

> the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

In *Lynah v. U. S.* the majority of this Court, speaking through Mr. Justice Brewer, said (at page 471 of 188 U. S.):

> "But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

And, earlier in the opinion, (page 465 of 188 U. S.) he said:

> "The Government may take real estate for a postoffice, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obli-

> gation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

(In the *Lynah* case, three Judges dissented, upon the ground that the property had not been "taken" in a legal sense, because, by means of embankments and pumps, the flowing of the lands, which the majority found amounted to a taking, could have been prevented. The dissenting Judges do not dispute the propriety of the rule under a state of facts that calls for its application.)

In the *Buffalo Pitts Co.* case (supra), Mr. Justice Day, speaking for this Court, quotes with approval from the majority opinion in the *Lynah* case, and also says (foot of p. 235 of 234 U. S.):

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this Court, and arises because of the Constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States guarantying the owner of property against its appropriation for a governmental use without compensation."

In the *North American Trans. & Trading Co.* case (supra), the Commanding General of the Army in Alaska took possession, as a site for an army post, of a tract of public land which included plaintiff's mining claim. No condemnation proceedings were instituted, but the Government kept possession continuously ever after the taking. Mr. Justice Brandeis, speaking for this Court, in affirming the judgment of the Court of Claims in favor of plaintiff, says, (p. 333 of 253 U. S.):

> "First. When the Government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor."

And further:

> "In order that the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

The conditions precedent to liability thus stated are present in the instant case. The physical possession of the ships was taken by the Shipping Board or by the Navy Department, pursuant to the express directions of the President, which he issued by virtue of the power given him by the Joint Resolution authorizing him to "take over to the United States the immediate possession and title" of the ships and "through the United States Shipping Board, or any Department or agency of the Government, to operate, lease, charter and equip" the ships.

In *A. W. Duckett & Co., Inc. v. U. S.* (supra), the plaintiff was the lessee of a pier which formed a part of the Bush Terminal for a term running through to September 30, 1919. Under the Act of August 29, 1916, 39 Stat. 619, 645 (printed infra p. 20), silent as to compensation, the President took possession, through the Secretary of War, of the Bush Terminal. The pertinent provisions of the general order of the Secretary of War announcing the taking read as follows:

> "To Whom It May Concern * * * Possession and control is hereby taken* * *of the following described parts of a system of transportation * * * that is to say, all those portions of the Bush Terminal, docks and warehouse property described.* * * Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises."

Notice of this order was served on the Bush Terminal Co. The Receiver of Duckett & Co. was notified that "the Bush Terminal has this day been requisitioned for the use of embarkation service of the U. S. Army, and possession thereof has passed to the United States," and he was directed to make arrangements for vacating the premises. As the result of conferences, the United States took possession of the pier at midnight, January 31, 1918.

Mr. Justice Holmes, speaking for this Court, describes the procedure by which the taking was effected as *"in rem* as in eminent domain." The opinion holds that an implied promise arose from the order proclaiming the taking, saying, "Whatever the effect of the taking, *there was a contract implied in fact by the President's order* * * *". The part of the or-

der from which a promise could be implied was this: "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises." It is respectfully submitted that this language no more implies a promise than does Section 2 of the Joint Resolution of May 12, 1917, reading:

> "That the Secretary of the Navy be, and he is hereby authorized, and *directed to appoint, subject to the approval of the President, a board of survey whose duty it shall be to ascertain the actual value* of the vessel, its equipment, appurtenances, and all property contained therein, *at the time of its taking,* and to make a *written report* of their findings to the Secretary of the Navy, *who shall preserve such report* with the records of his department. *These findings shall be considered as competent evidence in all proceedings on any claim for compensation.*" (Italics counsel's.)

The *promise of the President that steps will be taken* to ascertain just compensation, is surely of no more weight than the *direction of Congress that steps shall be taken* to that end.

In *Campbell v. U. S.* (supra) in the words of the Court:

> "An officer of the Army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land * * *"

Of this taking this Court, speaking by Mr. Justice Butler, said:

> "The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands." (Citing 39 Stat. 215, 40 Stat. 241, as amended by 40 Stat. 518) "And from the *taking* there arose an implied promise by the United States to compensate plaintiff for his loss." (Italics counsel's.)

Thus the Court holds that a taking done pursuant to statutory authority, although not accompanied by any words adding strength to the action, raises an implied contract to pay.

The takings in the case now before the Court were, on the face of the Proclamations, done under authority of the Joint Resolution, and therefore, according to the doctrine of the *Campbell* case, raise an implied contract of payment.

The Joint Resolution gave to the President a discretionary authority, without any reservation concerning the legal consequences which should ensue upon its exercise. He exercised the authority, and the consequences ensued of themselves, every department of the Government except Congress being powerless to prevent this automatic result.

The contentions under this Point, summarized, are as follows: Because the taking was by eminent domain, the owners are entitled by law to compensation. This right is grounded in the Constitution, supported by the Joint Resolution, and also rests upon an implied promise arising out of the Constitution, plus the Resolution, plus the action taken pursuant to the Resolution.

III.

As the taking was by eminent domain, and entitled the former owner to compensation, there is jurisdiction in the Court of Claims under section 145 of the Judicial Code to entertain a suit to determine the proper amount of the compensation.

The pertinent provisions of Section 145 of the Judicial Code (36 Stats. 1136) read as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable; *provided, however,* that nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

The benefit of Sec. 145 is extended to aliens whose Government extends a like right to American citizens (as appellant's Government does—See Petition,

R. 1, pars. 1 and 2) by Sec. 155 of the Judicial Code (36 Stats. 1139) reading as follows:

> "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

In the point preceding this an effort has been made to show that appellant's claim is founded upon the Constitution, upon a law of Congress and upon an implied contract. If the Court finds that the claim is based on any one of these foundations, no argument is required to demonstrate that the Court of Claims has jurisdiction under Sec. 145. It would then be true, as was said in the *Duckett* case, that "there is no doubt concerning the jurisdiction of the Court of Claims."

The Court below said (Case, p. 13, last par. of Opinion):

> "The Act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in *Haycraft's* case, supra; 'It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided.'"

And previously (R. 12, folio 17), the Court had said:

> "It is significant when the policy of legislation during the war is considered that pro-

vision was made for action against the Government in all cases where it was intended to confer the right."

Regarding these observations, counsel submits (a) that it is of no moment that the Joint Resolution did not expressly confer jurisdiction; (b) that it is of no moment that in other legislation enacted during the war "provision was made for action;"—(the *Duckett* case establishes these two propositions)—(c) that to say that the Court's general jurisdiction does not extend to suits of this kind is only to beg the question. That dictum necessarily assumes the soundness of this theory: That an alien generally entitled to bring suits in the Court of Claims is disentitled to sue for the value of property taken from him under circumstances which would entitle a citizen to sue, ***merely by reason of the fact that at the time of the taking his government and ours were at war.*** But this is not to be assumed; it is to be reasoned about. It is the nub of the case.

In the next point an effort will be made to demonstrate that the theory thus assumed by the court below is unsound; and that the true rule of law is that such an alien may sue, after the restoration of peace, unless *Congress* has deprived him of the right; and that, in the present instance, Congress has not done so,—in other words, that the jurisdiction granted by Sec. 145 of the Judicial Code and the right to sue, granted aliens by Sec. 155, is not taken away by the mere fact—without more—that war has occurred. (Of course the right to sue is suspended so long as war lasts, but it revives when peace returns.)

IV.

The propositions put forth in the preceding points, undeniably sound as applied to the taking of property belonging to a citizen, are in this case no less sound by reason of the fact that appellant was an alien enemy.

As just stated, underlying the decision of the Court below is the assumption that because appellant was an alien enemy it was ipso facto deprived of the benefit of the Constitutional provision (Amendment V) guaranteeing due process of law and protecting private property against takings for public use without compensation.

Counsel believes this theory to be wrong. All that this Court has ever asserted regarding this question is that, *if Congress so enacts,* the private property of enemy subjects *may* be confiscated. This assertion has never been made with respect to property protected by such treaty provisions as applied to appellant's ships; nor has it been made since the principles embodied in Articles 1 and 2 of Convention VI of the Second Hague Conference had attained a fixed place in international law; nor since official spokesmen for the United States had asserted that our country claimed (and by long practice had exemplified) rights of protection and immunity for enemy merchant ships still greater than those afforded by Convention VI.

Without attempting to detract from the opinions in which this Court has given utterance to the doctrine that Congress may, in general, authorize the confiscation of the private property of alien enemies, doubt may be expressed whether those decisions

would support a holding that the Constitution permits Congress to authorize the confiscation of the ships of this appellant. The Prussian Treaties (supra p. 40) and the decision in *Society, etc. v. New Haven,* 8 Wheat 464, read together, seem to deny the power. *McVeigh v. U. S.* (1871) 11 Wall. 259, and *U. S. v. G. W. P. C. Lee* (1882) 106 U. S. 196 at least bring the power into question, for they hold an alien enemy entitled to *some* of the safeguards of the Fifth Amendment—and if to some, why not to all?

In *U. S. v. New River Collieries Co.* (1923), 262 U. S. 341, this Court, speaking by Mr. Justice Butler, remarked that the war did not suspend or affect the provisions of the Fifth Amendment; and in *ex parte Milligan,* 4 Wall. 2 (at p. 120-121), it declared this principle in terms which (especially when the later *McVeigh* case is remembered) seem broad enough to embrace even alien enemies, and seem peculiarly applicable to a case wherein a standing in court—otherwise not to be doubted—is denied merely because the plaintiff's government and ours came to be at war. This Court, through Mr. Justice Davis, in the *Milligan* case, said:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, *and covers with the shield of its protection all classes of men, at all times, and under all circumstances.* No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that *any of its provisions* can be suspended during *any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based

> is false, for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proven by the result of the great effort to throw off its just authority." (Italics counsel's).

This Court said "these provisions *cannot be suspended,*" i. e., not even by an Act of Congress. But in the instant case the Court below held, in effect, that they *were* not only suspended, but swept away, without one word from Congress, by the mere fact that war occurred between our country and that of the appellant.

Moreover, the claim of a power to confiscate would do violence to Convention VI of the Second Hague Conference, and greater violence still to what our delegates to that Conference described as a principle and practice of the United States (and indeed of all civilized countries) so long held and so uniformly followed as to "place it in the category of obligations." (Foreign Relations, 1907, Part 2, p. 1158).

For the reasons suggested, the power of Congress will not be conceded; but to abbreviate the argument all that will be urged is that, *if the power exists, Congress has not exercised it.*

In *Brown v. U. S.* (supra) this Court held as follows:

1. That a belligerent government has power to confiscate the private property of enemy subjects found within its borders (8 Cranch, foot of p. 122).

2. That, in this country, this power may be exercised only by Congress. "It is proper for the con-

sideration of the legislature, not of the executive or judiciary." (Ibid, p. 129.) "But until that will (of the "sovereign authority," i. e., of Congress) shall be expressed, no power of condemnation can exist in the court." (Ibid, top p. 123).

3. That "a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent" (Ibid, p. 127).

4. That the executive may not seize, nor the courts condemn, property which is subject to confiscation, unless Congress authorizes confiscation. (Ibid, p. 128).

5. That the declaration of war against Great Britain in 1812 did not authorize confiscation, because it did not contain any expression indicating an intention to confiscate. (Ibid, p. 127). (To show that, judged by the same reasoning, the Declaration of War against Germany did not authorize confiscation, the two Declarations are printed in the margin.*)

***Declaration of War against Great Britain**
1812

(2 Stat. at L. p. 755)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and

Declaration of War against Germany
1917

(40 Stat. at L. Part 1, p. 1)

"Whereas the Imperial German Government has committed repeated acts of war against the government and the people of the United States of America: Therefore be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof. Approved, June 18, 1812."

the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.
Approved, April 6, 1917."

[It must be admitted that in *Brown v. U. S.* the Court stated the question before it as one relating to "British property found on land at the commencement of hostilities." It is submitted, however, that, in reason, appellant's ships, idle and tied up to docks in American waters for almost three years, fall within this category rather than any other; or at least that the rule applying to them should be the same. Chief Justice Marshall suggests that, in international law prior to the decision in *Brown v. U. S.*, "in practice vessels with their cargoes, found in port at the declaration of war, may have been seized." But such a practice, if authorized at that time, has been universally abandoned, at least since the Crimean War; and, as denying its present existence, Mr. John Bassett Moore (Digest of Interna-

tional Law, Vol. 7, p. 308), quoting from Hall says:

> "*Property* belonging to an enemy which is found by a belligerent within his own jurisdiction, *except property entering territorial waters after the commencement of war,* may be said to enjoy a practical immunity from confiscation." (Italics counsel's.)]

The Court below referred to *Brown v. U. S.* to support its observation that "the Joint Resolution was an exercise of the war power of Congress" and that it "finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water." (Opinion, R. 9, 3d par.)

The *Brown* case, however, indicates that an intention to exercise war power against enemy private property *will not be presumed from the mere fact that war exists,* but must be fairly apparent on the face of the statute; and counsel submits that Marshall's opinion affords no ground to suppose that he would have ascribed to the war power, as a measure of confiscation, an Act of Congress that applied to a class of property, some of which had come into the ownership of citizens, allies or neutrals, and all of which, if taken, was required to be appraised,—the report of the appraisers to be "Competent evidence in all proceedings on any claim for compensation."

It is submitted that the true doctrine of the *Brown* case as applied to the circumstances of the instant one, is that, inasmuch as Congress has not in any manner shown an intention to confiscate appellant's ships or to deprive appellant of any property rights, appellant stands, both in respect of its right to be compensated and its right to sue in the Court of Claims,

in exactly the same situation as that of a citizen owning ships taken under the Joint Resolution.

The unsoundness of the view held by the Court below is demonstrated by the fact that, as applied in Case No. 111, (*Atlas Line SS. Co. v. U. S.*) it resulted in a finding that a domestic corporation owning barges that had been under American enrollment since 1913 and that were taken under the Joint Resolution, was without right or remedy, presumably by reason of the fact that the stock of the owning corporation was held by Germans.

To further support its conclusion that the Joint Resolution was an exercise of the war power and rested upon the Constitutional provision empowering Congress to declare war and make rules concerning captures on land and water, the Court of Claims invoked cases that may be classified as follows:

(a) *Cases arising under the Trading with the Enemy Act of October* 6, 1917 (40 Stats. 411).

Stoehr v. Wallace, 255 U. S. 239

Commercial Trust Co. v. Miller, 262 U. S. 51.

Fischer v. Palmer, 259 Fed. 355

Salamandra Ins. Co. v. N. Y. Life Ins. Co. 254 Fed. 852.

(b) *Cases arising under the Civil War Confiscation Acts of Aug.* 6, 1861 (12 Stats. 319) *and July* 17, 1862 (12 Stats. 589).

Miller v. U. S., 11 Wall. 268

(c) *Cases arising under the Civil War "Abandoned and Captured Property Act" of March* 12, 1863 (12 Stats. 820)

Green's Case, 10 C. Cls. 466
Klein's Case, 13 Wall. 128
U. S. v. Anderson, 9 Wall. 56
Lamar v. Browne, 92 U. S. 187
Young v. U. S., 97 U. S. 39
Moore's Case, 10 C. Cls. 375
Haycraft v. U. S., 22 Wall. 81

(d) *Cases arising out of Naval and Military Captures during the Spanish War, made without any statutory authority:*
Herrera Nephews v. U. S., 43 C. Cls. 430; 222 U. S. 558
Ribas y Hijo v. U. S., 194 U. S. 315

It is thought that none of these cases support the view expressed by the Court of Claims.

As to the cases in Class (a), the lack of analogy between the Trading with the Enemy Act and the Joint Resolution of May 12, 1917 already has been shown (supra, p. 22).

As to the cases in Class (b), these decisions were evoked by statutes which contained the following provisions:

The Act of August 6, 1861 (12 Stats. 319) was entitled "an Act to Confiscate Property used for Insurrectionary Purposes" and provided that property of any kind, used or employed, or bought or sold with the intention to use or employ, in aiding the Confederacy, should be "lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, *confiscated* and condemned." Judicial machinery and procedure to effect this result were provided. Mr. Justice Strong, speaking for this Court in *Miller v. U. S.,* at p. 308 of 11 Wall., characterized the Act in the following words:

"It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet or promote the Rebellion, then a war, or to maintain the war against the Government."

The Act of July 17, 1862 (12 Stats. 589) was entitled *"An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."* Its first four sections prescribed penalties for the crimes of treason and insurrection. It then provided as follows:

"Sec 5. *And be it further enacted, That to insure the speedy termination of the present rebellion,* it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States, that is to say:

"First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States.

"Secondly. Of any person hereafter acting as President, Vice-President, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner or consul of the so-called confederate states of America.

"Thirdly. Of any person acting as governor of a state, member of a convention or legislature, or judge of any court of any of the so-called confederate states of America.

"Fourthly. Of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called confederate states of America.

"Fifthly. Of any person hereafter holding any office or agency under the government of the so-called confederate states of America, or under any of the several states of the said confederacy, or the laws thereof, whether such office or agency be national, state, or municipal in its name or character: *Provided,* That the persons, thirdly, fourthly, and fifthly above described shall have accepted their appointment or election since the date of the pretended ordinance of secession of the state, or shall have taken an oath of allegiance to, or to support the constitution of the so-called confederate states.

"Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

"Sec. 6. *And be it further enacted,* That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the

United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance, to the United States, all the estate and property, moneys, stocks and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof. And all sales, transfers, or conveyances, of any such property after the expiration of the said sixty days from the date of such warning and proclamation shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Sec. 7 provided for proceedings *in rem* to effect confiscations required by the preceding sections.

A Joint Resolution was enacted July 17, 1862 (12 Stats. 627) explaining and qualifying the foregoing statute, exempting certain acts and certain classes of persons from its operation, and providing that "nor shall any punishment or proceedings under said Act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

In *Miller v. U. S.* (supra), a majority of this Court held that these two statutes were enacted in the exercise of the *war power* (78 U. S. 305-314). Mr. Justice Field, in a dissenting opinion, concurred in by Mr. Justice Clifford, reasoned that the Act of 1862 was *"not passed in the exercise of the war powers of the Government, but in the exercise of the municipal power of the Government to legislate for the punishment of offenses against the United States."* (78 U. S., last par. of p. 319). This seems to have been the tacitly admitted view of the whole Court

a year earlier, for in *U. S. v. Anderson* (1870) 9 Wall. 56, (at top of p. 67) it is said unanimously of the act of July 17, 1862 that "The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, insofar as it claims the right to seize and condemn their property, *as a punishment for their crimes,* recognizes that certain legal proceedings are necessary to do so." (Italics counsel's). Whatever be the foundation of these statutes, it is submitted that their content, and their purposes as expressed in their titles, are not such as to lead a reasoning mind to accept a judicial decision, based upon them, as precedent for the proposition that the Joint Resolution of May 12, 1917 is an exercise of the war power, and has the practical effect of confiscation by closing the doors of a court which otherwise would be open to appellant. The test of the applicability of the Civil War confiscation Acts was this: Was the property in question intended to be used to aid the rebellion; or was its owner giving aid to the rebellion? If the answer were yes, the statutes expressly commanded confiscation. The test of the applicability of the Joint Resolution of 1917 was this: Was the ship German owned, in whole or in part, or under German registry or flag when she came into our waters? If the answer were yes, the Resolution permitted her to be "taken over" to the United States in possession and title, and, if she were taken over, required that she be appraised and that the appraisal should be "evidence in all proceedings on any claim for compensation."

The Abandoned and Captured Property Act of March 12, 1863 (12 Stats. 820) was entitled "An

Act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States."

So far as pertinent to this discussion, its provisions were as follows:

Section 1 authorized the Secretary of the Treasury to appoint special agents "to receive and collect all abandoned or captured property" in insurrectionary territory; excepting property used or intended to be used in waging war against the United States.

Section 2 authorized the appropriation of such property "to public use on due appraisement and certificate thereof," or the sale thereof in loyal territory, at auction to the highest bidder, the proceeds to be paid into the U. S. Treasury.

Section 3 required that the agents should give bond and that accounts should be kept, and provided that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said Court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds,"—after deduction of expenses, etc.

Section 4 provided that there "shall be confiscated to the use of the Government of the United States" property coming into loyal territory from insurrectionary territory otherwise than through the Treasury agents; and, by reference incorporating other statutes, afforded procedure to effect the condem-

nation and sale of confiscated property, and punishments for unauthorized persons bringing such property into loyal territory.

Section 5 referred to the payment of certain agents.

Section 6 required persons in the military service to turn over to the Treasury Agents property affected by the Act, and provided penalties for failure to do so.

Section 7 exempted from the operation of the Act lawful maritime prizes by the naval forces of the United States.

The nature and effect of the Act were described by this Court in *Klein's Case,* 80 U. S. 138, in the following words:

> "That it was not the intention of Congress that the title to these proceeds should be devested absolutely out of the original owners of the property, seems clear upon a comparison of different parts of the act.
>
> * * *
>
> "* * *The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof, and, on proof that he had never given aid or comfort to the Rebellion, receive the amount after deducting expenses.
>
> "* * *There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and restoration of the pro-

> perty is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed."

The several cases arising under this Act, cited in the opinion of the Court below, will now be analyzed.

Green's case, 10 C. C. 466, held that:

> "All persons on this (northern) side of the military lines, from the legal point of view, were the enemies of all persons on the other,"

and that hence there was no liability of the Government

> "for the acts of its officers, done under cover of its authority, within the insurrectionary district, where the party injured was loyal, and the circumstances were such as would give to a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property shall not be taken for public use without just compensation."

The Court said that the only exception was the right given by the Act under discussion. It denied relief to Green under that Act because the suit was not commenced until after the statutory period of limitation had run. It summed up its denial of his right to maintain the suit on grounds outside that Act by saying:

> "Our conclusion is that the Government is not liable upon implied contract to any person, loyal or disloyal, for property taken by its agents, civil or military, during rebellion, *within the insurrectionary district."*

It is a necessary corollary of the reasoning of this case that property found *in our territory,* outside the field of hostilities, although owned by a subject of the enemy, is not to be regarded as subject to confiscation, in the absence of an authorizing statute. So this Court held in *Brown v. U. S.,* 8 Cranch 110.

Miss Moore's case, 10 C. C. 375, so far as pertinent, is also easily to be distinguished. For certain property she was allowed to recover under the Abandoned and Captured Property Act. The property for which a recovery was denied was captured by combined military and naval forces in March, 1862, in the progress of hostile operations against the town of New Berne, in insurrectionary territory, and prior to the passage of any statute authorizing loyal owners to recover the proceeds of property captured in insurrectionary districts. The seizure was justified under the laws of war as a capture by military forces, in hostile territory. If not so justified, it was a tort.

Klein's case, 13 Wall. 128, is referred to above and needs no further mention. (The principal point involved related to the effect on the claimant's rights of a pardon.) It may be remarked in passing that the Court says—p. 144 of 13 Wall—that "it was urged in argument that the right to sue the Government in the Court of Claims is a matter of favor; but this seems not entirely accurate. *It is as much the duty of the Government as of individuals to fulfill its obligations.*" (Italics counsel's.)

Most of the questions involved in *U. S. v. Anderson,* 9 Wall. 56, are wholly foreign to the point at issue here. They related to limitations under the Abandoned and Captured Property Act; the validity

of titles acquired by purchase from insurrectionaries; the competency of witnesses; and the right of the Court of Claims to render a judgment for a specific sum.

As pertinent to the present discussion, and showing the futility of the claim that the *Anderson* case supports the proposition that the Joint Resolution of May 12, 1917 is an exercise of the war power, it may be remarked that the Court said (p. 65 of 9 Wall.):

> "During the progress of the war it was expected that *our forces in the field would capture property*, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of."

And further (Ibid p. 67)

> "But by the Act in question the Government yielded its right to seize and condemn the property which it *took in the enemy's country*, if it belonged to a faithful citizen * * *" (Italics counsel's).

These remarks seem to indicate that in the view of this Court the right of the United States to take the property that was involved in the cases arising under the Act in question, was the right possessed by a beligerent *operating in the territory of his enemy*—a situation wholly dissimilar to that presented by the seizure of appellant's ships under the Joint Resolution of May 12, 1917.

Lamar v. Browne, 92 U. S. 187, was a suit by the former owner of cotton taken under the Abandoned and Captured Property Act against the Treasury agents who had received it from the military com-

mander and dealt with it as provided in the Act. Judgment went for the defendants upon the following theory: (a) that the Treasury agents "occupied the same position as to the plaintiff that the military authortiies did" (92 U. S. 200); and (b) that the "military forces, therefore, in taking possession of the cotton in controversy, were clearly acting within the general scope of their powers as an army still in possession of enemy territory under orders from their superiors." (Ibid, 197). The capture of the cotton, no matter what the citizenship or allegiance of its owner, was held legal because it "was seized by the military forces of the United States in obedience to the orders of a commanding general" (Ibid, 193),—while "still, in fact, a state of war existed," and the place where the seizure occurred was actually governed by means of military occupation (Ibid, p. 193). The decision rests squarely upon the ground that the taking of the cotton was a military capture by an army operating in the enemy's country—a fact impossible to assume in regard to the taking of appellant's ships.

Young v. U. S., 97 U. S. 39, was a suit by the trustee in bankruptcy of a blockade runner who, during the war, was a subject of and domiciled in Great Britain, and from thence had actively aided the Confederacy, to recover for cotton belonging to him, in storage at Savannah, and seized there by our military forces upon the capture of that city, and sold by Treasury agents in New York pursuant to the Act. This Court, speaking by Mr. Chief Justice Waite, said:

> "It is beyond doubt that, during the war, cotton found within the Confederate territory,

> though the private property of non-combatants, was a legitimate subject of capture by the national forces" (citing cases) and "The authority for the capture was not derived from any particular act of Congress, but from the character of the property, * * *"

the importance of cotton in enabling the Confederacy to maintain itself and carry on the war being stated at length.

The Court also said (97 U. S. 60) "all property within enemy territory is in law enemy property just as all persons in the same territory are enemies;" and it held that the location of the property authorized its seizure by an army operating in enemy's country.

Haycraft v. U. S., 89 U. S. 738, was a suit by one who admitted that he had given aid and comfort to the Rebellion, had refused to take the oath of allegiance, and whose disabilities were not removed until the general Proclamation of December 25, 1868, after the expiration of the time for bringing suits fixed by the Abandoned and Captured Property Act, and who therefore was precluded from the benefit of the Act. He asserted that as he had been pardoned after the expiration of the period of limitations contained in the statute he was entitled to recover for his cotton as upon implied contract. The petition (taken to be true, as the case was disposed of on demurrer) alleged that the seizure occurred within the Federal lines and was not a valid capture in war. Perhaps in view of this allegation, this Court said that the taking was "under the authority of an Act of Congress" and that "we must look to the Act to see if this promise has been made." (89 U. S. 92). Looking to the Act the Court said:

> "There was no promise * * * except to such as should commence the suit in time, and

> upon the trial be in a condition to bring themselves within the requirements of the Act. The promise, such as it is, was express. There is no room left for implication. Pardon and amnesty have no effect, except as to such as sue in time." (Ibid p. 96)

And, further (p. 98):

> "There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided and, consequently he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

Thus this Court held that the requirement of bringing suit within two years was an incident to the jurisdiction of the Court of Claims, rather than a statute of limitations—that the sovereign had consented to be sued only in case he were sued within two years. The Court also said that there was no question of confiscation, but that the statute giving the right required the remedy to be exercised within

two years or not at all, and had given the Court jurisdiction only of cases commenced within the two-year period. Nothing was decided that has any application in the instant case.

The cases just discussed arose under a statute that authorized the sale of property captured or abandoned in insurrectionary territory, treating it as enemy property because of its location in the enemy country, and that permitted the Court of Claims to give judgment for the amount of the proceeds, lodged in the Treasury, in favor of such loyal owners (and, later, disloyal owners also if they had been pardoned) as brought their suits within two years after the close of the war. The statute was an act of grace. Without it there could have been no recoveries, for all the takings were either captures lawful by the rules of war, without legislative authority, because made in the course of hostile operations in the enemy's country; or they were torts. These decisions therefore have no bearing on the case now before the Court, and no language contained in them is of binding force in the determination of rights arising under a statute by means of which the United States, by permissive authority, acquired absolute title to property located outside the field of military operations, subject to a mandate that the property acquired must be officially appraised and that the appraisal should be "evidence in all proceedings on any claim for compensation."

The Spanish War cases, listed in Class (d), are true examples of war-power takings giving rise to no cause of action.

In *Ribas y Hijo v. U. S.*, 194 U. S. 315, and in *Herrera Nephews v. U. S.*, 222 U. S. 558, recovery

was sought for the value of the use of Spanish vessels, having Spanish masters and crews, captured by our naval forces in Spanish territorial waters in the course of hostile operations and thereafter employed by our army for war purposes. There was no statute authorizing the seizures, and this Court described their character as follows:

(*Ribas* at p. 323 of 194 U. S.)

"The seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations * * *"

And, (*Herrera,* at p. 569 of 222 U. S.)

"Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemies' property, and subject to seizure, confiscation and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war."

It was also said in this case (Ibid, p. 573) that if the seizure was not justified as a military act it was a tort.

Of course this cannot be said of the seizure of appellant's vessels, done as it was under the order of the head of the Government and by express authority of an Act of Congress.

In *Juragua Iron Co. v. U. S.* (1909) 212 U. S. 297, buildings in Cuba, belonging to an American corporation doing business there, were burned by order of the commanding general of our army on ad-

vice of his medical corps, for protection of the health of the troops, the buildings being supposed to contain yellow fever germs. The Supreme Court held that the destruction did not expose the United States to liability of suit, on the ground that the property *because of its being located in the enemy country and in the theater of war,* was to be deemed enemy property, despite its American ownership; and said (212 U. S. at p. 306), it was "indeed, subject, under the laws of war, to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy." And to the contention that the destruction was not justified by the laws of war, the Court said:

> "Again, if, as contended—without, however, any basis for the contention—the acts of that officer were not justified by the laws of war, then the utmost that could be said would be that what was done pursuant to his order amounted to a tort, and a claim against the government for compensation on account thereof would make a case 'sounding in tort,' but of such a case the court would, of course, have no jurisdiction under the act of Congress."

The right to destroy the property under the laws of war was said to exist because "the plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country."

As applied to the case now before the Court, this

reasoning leads logically to the conclusion that the appellant, as a German corporation doing business in the United States, was to be regarded, with respect of its property in this country, as *not* being an enemy. The same result flows from the reasoning employed in the other Spanish War cases that have been discussed, and it accords with the reasoning of Marshall in *Brown v. U. S.,* (supra) that express interposition by Congress is necessary to deprive enemy property, *found here at the commencement of hostilities,* of the rights that our law accords to property in general.

The Civil and Spanish War cases cited by the Court below have been analyzed and discussed for the purpose of showing that they all so differ from the instant case, either in respect of facts, or in respect of the statutory basis of decision, as to clearly distinguish them from the case at bar. The instant case can be decided in favor of appellant without doing violence to any preceding decision. It cannot be decided against appellant without impairing the doctrine of *Brown v. U. S.* That case remains the landmark, guiding the mind to a correct determination here. It repels the conclusion that appellant's ships were confiscated. It leads to the conclusion that the takings created a right in favor of appellant. *Hanger v. Abbott,* 73 U. S. 532, establishes that, with the return of peace, Sections 145 and 155 of the Judicial Code once more afforded appellant a means and forum for enforcing this right, and unless these cases are to be overruled it is a necessary conclusion that the Court below erred in pronouncing a decision that effected a practical confiscation of appellant's property by denying access to the only competent tribunal.

V.

The Peace Resolution of July 2, 1921, and the Treaties of Berlin and Versailles do not destroy appellant's right nor bar its remedy.

The Government's brief in the Court of Claims set up the following contention:

> "Regardless of whether this taking of ships by the United States was a seizure of enemy property in time of war or whether it was a tort, and even assuming, but not conceding, that there is some expressed or implied contract or agreement to compensate for the same, or some Act of Congress that authorized compensation therefor, yet the provisions of the Treaty of Berlin, together with the provisions of the Treaty of Versailles, which by virtue of the Treaty of Berlin, as well as the Joint Resolution of Congress of July 2, 1921, are carried into the substantive laws of the United States, confirm and ratify the taking of these ships by the United States and prohibit the claim here made by this claimant and prevent its allowance or adjudication by this court."

In elaborating this contention the Government invoked the following:

> Sections 2 and 5 of the Peace Resolution of July 2, 1921 (42 Stat. Part I, 105), incorporated also in the Treaty of Berlin (42 Stats. Part II, 1939).
>
> Article I of the Treaty of Berlin and a part of Article II.
>
> Certain portions of Article 297 and the Annex thereto of the Treaty of Versailles.

It is not believed that this material, properly understood, has the effect which the Goverment as-

cribed to it in the Court below, and, presumably, will ascribe to it here.

As to the Peace Resolution and Berlin Treaty proper:

Section 2 of the Peace Resolution (incorporated also in the Treaty of Berlin) reads as follows:

> "That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

Section 5, so far as pertinent and excluding irrelevant matter, reads as follows:

> "All property * * * of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents or employees, from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specific-

ally hereafter shall be provided by law until * * *" the German Government shall have performed certain conditions.

Now one of the *rights* acquired by the United States by *virtue of an Act of Congress,* and which is expressly reserved to the United States by Section 2, is its right in, (title to and possession of) the ships acquired pursuant to the Joint Resolution of May 12, 1917. It seems to be clear that the right to the ships is derived solely from the Act (Joint Resolution) of Congress. The ships were never put through a prize court, and the only title or evidence of title the United States possesses results from the Joint Resolution and a Proclamation of the President. The important result is that the ships are not a part of the property of *German nationals* directed by Section 5 of the Peace Resolution to be "retained and no disposition thereof made, * * *" The ships were the property of the United States when the Peace Resolution was adopted, and it operated upon them only by way of reserving (confirming) the title the Government had previously acquired. That the Government itself has taken this position ever since the passage of the Peace Resolution and the adoption of the Berlin Treaty (August 25, 1921) is a matter of public record. Since that time the United States has sold many of the ships taken under the Joint Resolution of May 12, 1917. The records of the Shipping Board, of the Bureau of Navigation and of the custom houses where the ships were registered, disclose this fact. To cite one instance, the United States sold, in August, 1922, to the present appellant, the steamer then named the "Pocahontas," now named the "Bremen," and originally named the

"Princess Irene," under which name she was taken over by the United States from the North German Lloyd by virtue of the Proclamation of June 30, 1917, printed supra, p. 6.

This fact is of importance. Appellant asserts that by correct principles of statutory construction this ship property is outside Section 5 of the Peace Resolution. The United States supports this assertion by its act in selling, as its property, the former German ships.

By another fact, the exclusion of the ships from the retention provision of Section 5 is established. That is, that the property to be retained is the property of *Germans,* which was on April 6, 1917, or since has come "into the *possession* or under *control* of, or has been the subject of a *demand* by" the United States, etc. Considering the care with which words are employed in framing Treaties, it is a justified conclusion that this phraseology was advisedly framed to exclude property formerly German owned, but the actual title to which, as distinguished from mere possession, mere control or mere demand without either possession or control, had passed to the United States. The lesser cannot contain or comprehend the greater.

The proper conclusion seems to be that the words relate only to property taken under the Trading with the Enemy Act, a provision of which, previously quoted, reserves to Congress the right of disposing of property taken under that Act, in such manner as it might see fit, after the close of the war; and that property (such as the ships) to which the United States took actual title, under other acts of Congress, is intentionally excluded. Any other construction

would cast doubt upon the character of the title acquired by the United States, and upon its right to sell any of these ships in the absence of authority "specifically provided" by Congress subsequent to July 2, 1921. (The authority under which sales have been and are made is "Merchant Marine Act 1920," Act of June 5, 1920, 41 Stats. 988, Secs. 4, 5 and 6).

Section 5 of the Peace Resolution is also inapplicable because this suit does not seek the recovery of the ships themselves, nor of any fund created by the Government to represent the ships (there being no such fund).

As to the effect of the Versailles Treaty:

Articles I and II of the Treaty of Berlin secured to the United States the option of taking advantage of certain provisions of the Treaty of Versailles, if it should see fit to do so, by providing:

> "*Article I*—Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles, which the United States shall fully enjoy, notwithstanding the fact that such Treaty has not been ratified by the United States."
>
> "*Article II*—With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is un-

derstood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

"The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions."

In the Court below, the Government, assuming that the language just quoted had the effect of rendering the mentioned Parts of the Treaty of Versailles actually operative as a part of the public law of the United States, invoked the following provisions of Article 297 (contained in Part X), treating them as though they could be separated from their context, and, standing alone, given literal effect:

Par. (*d*)—"As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

A part of Par. (*h*) (2) *as follows*:—* * *
"The proceeds of the property, rights, and interests, and the cash assets of German nationals received by an Allied or Associated Power shall be subject to disposal by such

Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto." (The Government omitted to quote the remainder of this paragraph, reading: "Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.")

Par. (*i*)—"Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States."

Par. 2 of the Annex to Article 297—"No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power."

Standing alone, these provisions might seem to bar appellant's claim. Read in connection with their context and understood as applied in those countries wherein the Treaty of Versailles is operative, they have no such effect.

Perhaps it should suffice to say that the Treaty of

Versailles was not ratified and is not in effect in this country and forms no part of our law. It is considered better, however, to undertake a detailed study of the matter, in case the Court shall find itself compelled seriously to consider this phase of the case. The results sought to be demonstrated are:

1. Article 297 of the Treaty of Versailles, if operative in the United States, is not applicable to the case now before the Court.

2. Article 297 is not operative in the United States.

3. Article 297, if applicable and operative, has not the meaning or effect claimed for it by the Government.

Extracts from the Treaty of Versailles, necessary to be referred to in the argument supporting these propositions, are printed as Appendix B to this brief.

Article 297 is not applicable:

The plan of construction of the Versailles Treaty is this: There are 15 main divisions called "Parts." These are subdivided into "Sections," the Sections into "Chapters" and the Chapters into "Articles." Interspersed between Articles are numerous "Annexes."

Article 297 is found in Part X, the heading of which is "Economic Clauses," and is placed under Section IV, the subhead of which is "Property, Rights and Interests." Other Sections of this Part bear sub-heads as follows: I, "Commercial Relations;" II,"Treaties" (This details various old treaties of a commercial, economic or technical, rather than a political character, which are to be brought

again into effect with the restoration of peace;) III, "Debts;" V, "Contracts, Prescriptions, Judgments;" VI, "Mixed Arbitral Tribunal" (for decision and settlement of various commercial and property questions); VII, "Industrial Property;" VIII, "Social and State Insurance in Ceded Territory." Ships are not mentioned anywhere in this Part.

On the other hand, merchant shipping is dealt with specifically in Part VIII, headed "Reparation." Article 236 and Annex III in this Part set forth in detail the Treaty provisions relating to merchant ships. It would seem that if the Government relies upon the Treaty of Versailles it should cite those portions of the Treaty that relate to ships. Article 297 seems to be foreign to this subject, and hence the statement that, even if operative here, it is not applicable to the case before the Court.

It may be that the Government, in the Court below, refrained from invoking the provisions relating to shipping for the reason that, obviously, those provisions do not aid it in this case. By reference to them (see Part VIII, Annex III, Pars. 1 and 3) it appears that the merchant ships ceded by Germany to the Allied and Associated Powers included (and of course, could include) only such as were German owned at the effective date of the Treaty (at earliest for any Power, 1919); at which time the ships formerly owned by appellant had been for more than 2 years owned by the United States. Moreover, (See Part VIII, Annex III, Par. 8), the waiver by Germany of claims relating to shipping is only *"in respect of the detention, employment, loss or damage of any German ships,"*—words that do not comprehend and hence do not waive or bar a claim arising in favor of

a private German ship owner in consequence of a foreign Government taking title to his ships under such a law and in such a manner as to entitle him to compensation.

Furthermore (See Part VIII, Art. 236), if these provisions concerning merchant shipping were effective in respect of appellant's ships, or of its claim against the United States, the United States would be bound to credit Germany, on reparation account, with the value of the ships or the claim; and this the United States has not done.

Article 297 is not operative in the United States:

To show the truth of this statement requires reference to a number of the provisions of the Treaty with which Art. 297 is tied up, and the demonstration can proceed only slowly, and step by step.

The only provisions of the Versailles Treaty which ever could have become applicable to the United States are Section 1, of Part IV and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV (See Treaty of Berlin, Art. II). *And concerning these provisions the following points must be kept in mind.*

1. The United States was to have and enjoy the benefits of the mentioned provisions of the Versailles Treaty only in case it desired to. The United States was given an option to enjoy them; it did not obligate itself to accept them (Berlin Treaty, Art. I and first 2 paragraphs of Art II).

2. *If, however, the United States did accept the benefits of the mentioned provisions of the Versailles Treaty, it had to accept a corresponding burden by recognizing the correlative rights which these provisions accord to Germany.* In the words of the Berlin Treaty, "The United States in availing itself

of the rights and advantages stipulated in the provisions of that Treaty (*i. e.,* Versailles) mentioned in this paragraph, will do so in a manner consistent with the *rights* accorded to Germany under such provisions."

In the two preceding paragraphs the past tense has been used advisedly, because it is proposed to show *that the United States has definitely rejected Article 297 of the Treaty of Versailles* and has entered upon a course of action quite contrary to it, as a substitute more advantageous to the United States.

The scheme of Art. 297 is repugnant to the policy and to the law of the United States as already established by the measures taken by our Government in the execution of the Treaty of Berlin. *To seek to profit by Art. 297 in this case is to invoke a scheme which the Government has already definitely rejected, and to invoke as a rule of decision a foreign law (treaty) which is not law in this country.*

Art. 297 contains ten subdivisions, identified by letters running from (a) to (j). Some of these are in turn subdivided into as many as four paragraphs. Also this Article incorporates, by reference in its opening paragraph, an annex, which itself contains fifteen numbered sub-heads, a number of which contain several paragraphs each. Out of all this mass the Government selected the four paragraphs above printed, tore them from their context, tore them from each other, and set them up in bar of appellant's right of recovery, and attempted to justify this procedure by the unwarranted assertion that appellant is entitled to be compensated by its own government. It is submitted that a worse case of mutilation was never

seen, nor a more futile one, when Art. 297 as a whole is subjected to study and analysis.

As stated before, Art. 297 is found in Part X setting forth the "Economic Clauses" of the Treaty. By Article 243, which falls under Part VIII, dealing with Reparations, all of Section IV of Part X (including Article 297) is tied up with the Reparation Provisions. To consider intelligently the arguments advanced, the Court will find it necessary to read Article 297 and its Annex as an entirety, and also to read portions of Part VIII, especially Articles 231, 232, 233, 236 and 243, Annex III following Article 244, and Annex I following Article 244, all of which will be found in Appendix "B." Such a reading will demonstrate that Article 297 must be rejected, as repugnant to the plan adopted by the United States in carrying into execution the Treaty of Berlin.

First we point to Art. 243 of the Versailles Treaty:

> "The following *shall be reckoned as credits to Germany* in respect of her reparation obligations:
>
> "(a) Any final balance in favour of Germany under* * * Section IV of Part X (Economic clauses) of the present Treaty."

Therefore, inevitably, Section IV of Part X (which includes Art. 297) contemplates an accounting, and that if this yields a final balance in favor of Germany, the balance shall be reckoned as credits to Germany in respect of her reparation obligations.

By what procedure is this done? In brief, and in general, by the Allied and Associated Powers taking to themselves, primarily for liquidation and sale, although not necessarily so in every case, the

private property of German nationals found in their territories and crediting the *German State* with the value of the same against the *national obligations* which it assumes under the Versailles Treaty.

In detail, and necessarily at much greater length, the plan is as follows:

Article 297 taken as a whole provides:

(1) That the liquidation of enemy (Allied) property in Germany, where not completed, *shall stop*, and that restitution in specie shall be made of unliquidated property.

(2) That the liquidation of enemy (German) property in Allied and Associated countries *may* continue at the option of the Allied or Associated state concerned.

(3) That compensation shall be made to the nationals of the two sides who sustain private losses as a result of the liquidations.

Liquidations in Allied and Associated states, if continued, are to be carried out "in accordance with the laws of the Allied or Associated state concerned" (Art. 297 (b), and *that state must fix "the price or the amount of compensation in respect of the exercise of the right"* (to liquidate) "in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated." (Art. 297 (c).)

Nationals of Allied and Associated Powers may, in certain cases, have *restitution in specie* of their property taken in Germany, if that remains possible (Art. 297 (f).) If that is not possible they may be compensated by the grant of equivalents (Art. 297 (f) or by *cash payment* (Art. 297 (e).)

Regarding the liquidation of enemy property, Art.

297 divides the Allied and Associated Powers into three distinct groups or classes. It will be shown that the United States does not fall within either class. If this is shown, then it must be the case that the United States is not governed by Art. 297. For convenience the three classes of States set up by Art. 297 will be identified by numbers. They are as follows:

Class 1

(Described in 297 (h) (1):

Powers in which a Clearing Office has been set up pursuant to Sec. III of Part X. (Art. 296.)

Class 2

(Described in 2d paragraph (not numbered) of 297 (h) (2):

This class consists of "new States, which are signatories of the present Treaty as Allied and Associated Powers," and "States which are not entitled to share in the reparation payments to be made by Germany."

Class 3

(Described in 297 (h) (2), first paragraph):

Powers which do not fall within either of the foregoing classifications.

It will now be shown that the United States is not in Class I. Also, what results would follow from placing it in either Class 2 or Class 3. It is believed that this showing will result in the Court holding that it is not in either of those classes. And, of course, if it is found not to be in either class, then it follows that it is not governed by Art. 297 at all. (Later, the actual American plan will be shown).

The United States is not in Class 1 (Clearing System States). The setting up of a Clearing Office between the United States and Germany would have required that the United States give notice to Germany of its desire to do so within one month from the coming into force of the Treaty of Berlin (*i. e.*, November 14, 1921). This is established by a reading together of the following parts of the Treaties—Versailles, Art. 296, par. (e); Berlin, Art. II, par. (5), and Art. 440 of the Treaty of Versailles referred to in the paragraph of the Treaty of Berlin just mentioned. Such notice was not given and therefore the United States is not and cannot become a "Clearing System State."

Is the United States in Class 2? As it is not a new State, it can only fall within Class 2 by reason of being a State which is "not entitled to share in the reparation payments to be made by Germany." President Wilson and also Secretary Hughes have repeatedly announced that the United States has waived reparation. Also, at the Spa Conference of 1920 and the London Conference of May, 1921 (at neither of which was the United States a party), the reparation payments to be made by Germany were divided by the Allied Powers to the extent of 98½% of the total, leaving 1½% to be divided amongst other states, Poland and Rumania being expressly mentioned as recipients of this 1½%, although the language employed, would perhaps allow other states to share in it also. On the other hand, it may be that in consequence of the "Dawes Plan" and developments subsequent to and based upon it, the United States is now to be regarded as a Reparation State, (Class 3). The situation of the United

States, if placed in either classification, must therefore be considered.

For the purpose of argument the assumption first will be indulged, that the United States is *not* entitled to share, which would put it within Class 2, and it will be shown what the results of such a classification are. In Class 2 States, according to the provisions of 297 (h) (2), 2d (unnumbered) paragraph "the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 235 and 260, be paid direct to the owner." (For an instance of a payment direct to owner, ordered by a Tribunal established under this Treaty, see in Library of Congress, *Ellerman v. Etat Polonais*, Cause No. 1233, before German-Polish Arbitral Tribunal, Recueil des Decisions, des Tribunaux mixtes institues, par les Traitis de Paix, vol. IV p (in course of publication as this is written). Furthermore, "if on the application of the owner, the Mixed Arbitral Tribunal, provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudical to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State."

It is believed that this statement of the obligations imposed upon a Class 2 State is sufficient to cause this Court to hold that the United States is not in this classification. One or two illustrations to confirm this opinion will, however, be given.

First: Our Trading with the Enemy Act provides (last paragraph of Sec. 12) that German property taken by the Alien Property Custodian shall be disposed of after the War in such manner as Congress shall direct. In Class 2 States it *must* be disposed of according to the provisions of the Versailles Treaty just quoted. That is, subject to the prior rights of the Reparation Commission, *it must be paid direct to the owner.* The Court will not suffer the Trading with the Enemy Act to be thus impaired by a Treaty which the Senate of the United States refused to ratify.

Aside from the lack of ratification there are positive legal obstacles in the *Treaty of Berlin* and the Senate reservation to its ratification. The Treaty of Berlin provides (Art. II, par. (4)):

> "That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so."

And the Senate reservation attached to the ratification of this Treaty provides:

> "That the United States shall not be represented or participate in any body, agency or commission, nor shall any person represent the United States as a member of any body, agency or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation."

Of course it is not for the Judicial Department of the Government to elect whether the United States shall take advantage of its rights to participate in the Reparation Commission; and, equally of course, the Judicial Department must take notice that no Act of Congress such as is contemplated in the Senate reservation just quoted has been passed. Therefore the Court cannot hold that the United States is a Class 2 State, because to do so would be to recognize rights in the Reparation Commission.

Second: In Class 2 States, the Mixed Arbitral Tribunal (which is another of the bodies which the Berlin Treaty and Senate reservation forbid the United States to have aught to do with) has the power, on application of the German owner, to award damages against a Class 2 State for having sold his property under circumstances "unfairly prejudicial to the price obtained." Let us see what definite application this would have if the United States were a Class 2 State.

In *U. S. v. Chemical Foundation,* 294 Fed. 300, the United States sought by a bill in equity to recover certain dye and chemical patents sold by the Alien Property Custodian. It asserted in its bill of complaint that the sale was made for a grossly inadequate consideration ($250,000, although all concerned on both sides admitted an actual value of millions of dollars), and it is asserted (in legal effect) that the inadequacy of the price was due to "conditions of sale or measures" * * * outside general legislation which were "unfairly prejudicial to the price obtained." In short, the United States asserted that sellers and buyers were the same persons, that the price was fixed arbitrarily without regard to val-

ue, and, to put it baldly, that fraud was practiced and the Statutes of the United States violated.

In an international tribunal the United States would be bound by these solemn allegations of a sworn complaint filed in Court by the chief law officer of the Government. Therefore, if the United States is a Class 2 State, the way is open for the former German owners to apply to the Mixed Arbitral Tribunal for relief. Their case would seem to be complete by the introduction of a copy of the Government's complaint in the *Chemical Foundation* suit and a copy of the judgment of a competent American Court holding the United States to be a Class 2 State. Nothing would remain but to determine the amount of the compensation which the Mixed Arbitral Tribunal should award in favor of the former German owners and against the United States.

Counsel is confident that in the light of the foregoing illustrative case this Court will not hold that the United States is a Class 2 State under Art. 297. To do so would be to run directly contrary to the quoted provisions of the Berlin Treaty and Senate Reservation.

Alternatively the assumption is indulged, again for the purpose of argument, that the United States *is* entitled to reparation and therefore would fall under Class 3, and the results of such a classification will be shown.

In Class 3 States the provision of the Treaty of Versailles is that (297 (h) (2), beginning the middle of the paragraph) "the proceeds of the property, rights and interests, and the cash assets of German nationals received by an Allied or Associated Power,

shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and *if retained the cash value thereof shall be dealt with as provided in Article* 243."

What does this language mean? First, if the United States is a Class 3 State the proceeds of German property would be subject to disposal by it "in accordance with its laws and regulations." Such proceeds *might* be applied in payment of claims of American nationals based upon German exceptional war measures, or the claims enumerated in paragraph 4 of the Annex, but could be used otherwise if the laws and regulations of the United States otherwise provided.

But how would the amount of these American claims and debts be established? According to paragraph 4 of the Annex, "the amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal." Art. 297 affords no other way of having the amounts ascertained.

Such proceeds *might* also be retained by the United States, *but if retained the cash value thereof must be dealt with as provided in Art.* 243 (that is, must be "reckoned as credits to Germany in respect of her reparation obligations;" and therefore, according to Article 237, would have to be divided

by the United States with the other allied and associated powers.

It appears therefore that if the United States is placed in Class 3, the results are as follows:

(a) That the amounts of the claims of Americans against Germany and German nationals are to be ascertained by an arbitrator appointed by Mr. Ador or by the Mixed Arbitral Tribunal, both of which are agencies which the Treaty of Berlin and Senate reservation thereto forbids the United States to have dealings with except by authority of an express Act of Congress, and so far there is no such Act of Congress.

(b) The provision of the Trading with the Enemy Act, above mentioned, declaring that the German property taken by the Alien Property Custodian shall be disposed of after the War in such manner as Congress shall direct, is once more impaired. That is to say, by way of illustration, under the Trading with the Enemy Act Congress has a right to devote the proceeds of the property taken by the Alien Property Custodian to the purpose, for instance, of establishing a university as a great war memorial; or to the purpose, for instance, of paying adjusted compensation to those who served in the late War.

Either of these plans, or in fact any other plan for the disposition of the property taken by the Alien Property Custodian, is open to the Government under the reservation of its rights contained in the Trading with the Enemy Act. In a word, under the Trading with the Enemy Act, which is American law, the Government has fully reserved its rights regarding the ultimate disposition of the property taken by the Custodian. With regard to such prop-

erty, it may *retain the same without making any accounting to anybody*. But if the United States is a Class 3 State, under Art. 297, it cannot retain any property taken by the Alien Property Custodian without *paying or crediting the cash value thereof* on account of German reparation (principally for the benefit of European powers) as provided in Art. 297 (h) (2).

In the light of this demonstration the Court will of course not hold the United States to be a Class 3 Power.

The result is therefore reached that Art. 297 does not govern the United States in this matter, because the United States is not in either of the three classes into which Powers governed by Art. 297 are divided, and therefore the Article provides no rule or method under which the United States could deal with German property.

With the United States not governed by Art. 297 at all, it seems hardly worth while to point out the special inapplicability of certain provisions thereof upon which the Government (in the court below,) chiefly relied. However, a few lines on this subject may be of interest to the Court, as it is clearly demonstrable that these provisions do not have the meaning or effect which the Government assigns to them, even if any part of Art. 297 were to be considered as applying to the United States.

The Government invokes par. (d) of Art. 297, by which Germany confirms the "exceptional war measures or measures of transfer" of the Allied and Associated Powers. The meaning of the quoted words is defined in par. 3 of the Annex to Art. 297. By referring to these definitions it appears to be very

doubtful whether the taking of the ships was an "exceptional war measure," or was a "measure of transfer." However, whether the taking of the ships did or did not constitute measures of the kind described, the provision of 297 (d) affords no ground of objection to these claims for compensation, *for the reason that the validity of the transfer of the title to the United States is not contested by the former owners, but, on the contrary, is assumed. We do not question the Government's title. We simply claim the compensation, the right to which flows out of the taking of title by the Government.*

The Government invokes par. (i) of Art. 297, respecting Germany's undertaking to compensate her own nationals, etc. This obligation by no means applies in all cases. For instance, in regard to Class 2 States (as herein called), this paragraph is meaningless, because those States are *required to pay the proceeds of liquidation direct to the former German owners. See Ellermann v. Etat Polonais,* (supra). Where the obligation does apply it is only for the reason that the correlative provisions of Art. 297 result in the *German State* getting full credit on its *national reparation obligations* for the value of liquidated German private property. If a given Power does not deal with German private property in its territory in such manner as to give the *German State* this benefit, the obligation on the part of the German State to compensate its nationals never arises. The reason ceasing, the law ceases with it. The contemplated consideration to Germany not moving to it, the mutual or reciprocal obligation undertaken by Germany to compensate its nationals never comes into force. Hence appellant in this

case has no claim against its own government for the value of its Ships expropriated by the United States, and, unless entitled to compensation from the United States, is entitled to no compensation at all, and can recover none.

The Government also invokes par. 2 of the Annex to Art. 297. Reading this entirely by itself it would seem to bar all claims. Reading it in connection with its context (the entire Article and Annex) it has by no means so broad an effect, and, especially, it appears to have no application at all in the present case.

It would be senseless to pretend that this provision has the meaning that no former owner of liquidated property shall have a claim for the payment of liquidation proceeds, because only a few paragraphs before (297 (h) (2) 2d (unnumbered) paragraph) certain States (those herein called Class 2) are *required* to pay the proceeds of liquidation direct to the owner. And the owner is *authorized* to prosecute a claim for damages against the State in question before the Mixed Arbitral Tribunal, on the ground that the sale or measures taken by the Government in question were "unfairly prejudicial to the price obtained."

This provision of par. 2 of the Annex has to be understood in connection with the rest of the provisions of Art. 297 and the Annex. Art. 297 (e) authorizes Allied and Associated Powers to claim against Germany not only payment of the proceeds of their property which Germany has liquidated, but also particular claims for damages resulting from German exceptional war measures. Art. 297 (f) entitles Allied subjects to claim from Germany

in certain cases restitution of property in specie instead of compensation by payment of the liquidation proceeds. The last part of paragraph 1 of the Annex renders void German liquidation measures in occupied territories, and measures taken after November 11, 1918.

The real meaning of par. 2 of the Annex is that German nationals must be satisfied with the amount of the liquidation proceeds realized by Allied Powers of the class herein described as No. 1 and No. 3, and cannot make particular claims for damages, as may be done in regard to property liquidated in Class 2 States, and as Allied nationals may do under 297 (e) as against Germany.

That this is the interpretation which the Allied Powers have put upon par. 2 of the Annex clearly appears in the case in the French-German Arbitration Court of *Societe Vinicole de Champagne v. Consorts Mumm,* decided October 24, 1921 (Recueil, Vol. 1, pp. 694). In this decision the claim of the Mumm firm (German) for avoidance of a French war measure and damages resulting therefrom was rejected, while its claim for the payment of liquidation proceeds (85,000,000 francs) was not disputed.

Now, since the purpose and effect of par. 2 of the Annex is only to compel Germans to be satisfied with the liquidation proceeds (in States other than Class 2) and to bar them from claiming *additional damages* suffered as an incident to liquidation, it necessarily follows that par. 2 has no application at all in the present case, *for the reason that the present case does not at all involve a liquidation.* The German ship property has not been liquidated in the sense in which that word is used in the Treaty of Versailles.

Title to it has been taken by the United States. Some ships have been sold, but in such cases the proceeds of sale have not been paid to the Alien Property Custodian, or to the Treasurer of the United States, as in the case of property taken under the Trading with the Enemy Act, to await Congressional action after the end of the war; but such proceeds have been received and used by the Shipping Board in conformity with the Acts of Congress which give the Board, for its authorized purposes, the moneys which it realizes from the sale of ship property. (See Sections 4, 5, 6 and 11 of Merchant Marine Act of June 5, 1920, Ch. 250, 41 Stat. at L. 988.)

The foregoing is thought to establish (1) that Art. 297 is not law for the United States; and (2) that even if it were so, its par. (i) and par. 2 of its Annex would have no application in the present proceeding.

For the purpose of confirming the assertion that Art. 297 is not law in the United States, its repugnancy to the plan (more advantageous to itself) which the United States has adopted as its law in the premises, will be shown in another manner:

Under date of August 10, 1922, the United States and Germany entered into an agreement "for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded between the two Governments under date of August 25, 1921." This Agreement, and the diplomatic notes exchanged between the two Governments and appended to the Agreement, appear in 42 Stat. at L., part 2, p. 2200, and are printed as Appendix "D" to this brief. Their pertinent provisions are also set forth in

parallel column alongside of the inconsistent provisions of the Treaty of Versailles, as follows:

Treaty of Versailles, Art. 297, Annex 1 Thereto and Reparation Provisions, Especially Arts. 231, 232, 233, 243 and Annex 1, (with especial reference to American nationals)	Law of the United States as Established by Peace Resolution, Treaty of Berlin and Agreement of August 10, 1922, as Interpreted by Diplomatic Notes Thereto Appended.
Scope.	*Scope.*
(Introductory phrase of Art. 297)	Introductory phrase of Agreement)
"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto."	"The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission * * *."

Claims Admissible.	*Claims Admissible.*
Art. 297 and Annex 4.	Treaty of Berlin.
Those of American nationals.	
1. For compensation in respect of damage or injury inflicted upon their property, rights or interest in German territory, including claims for the restitution of said property in specie.	1. Same.
Competent: Mixed Arbitral Tribunal.	Competent: Mixed Claims Commission.
2. For debts owing to them by German nationals.	2. Same.
Competent: Mixed Arbitral Tribunal and National Courts of the Allied, Associated or Neutral Powers.	Competent: Mixed Claims Commission.
(Art. 304 (b), par. 2.)	
3. For claims growing out of acts committed by the German Government, or by any German authorities since July 31, 1914, and before the United States entered into the war.	3. Same.
Competent: Mixed Arbitral Tribunal.	Competent: Mixed Claims Commission.
4. For amounts due in respect of claims with regard to the property, rights and interests in the territory of Germany's former allies.	4. Same.
Competent: Mixed Arbitral Tribunal.	Competent: Mixed Claims Commission.

Effect on Law of United States Existing Prior to Treaty of Versailles.

A. By superseding or repealing it:

The application of any one of the three alternative plans provided in Art. 297 for the three classes of states there described, would be in conflict with and hence, if followed, would supersede or repeal by implication, the provision of the first sentence of the last paragraph of Sec. 12 of the "Trading with the Enemy Act" (40 Stat. at L., 424) that "after the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct; * * *"

Effect on Law of United States Existing Prior to Treaty of Versailles.

A. By superseding or repealing it:

Nothing in either the Peace Resolution, the Treaty of Berlin or the Agreement of August 10, 1922, supersedes or repeals any prior existing American law. This new matter is all cumulative or supplemental.

B. By supplementing it:

Annex 4 to Art. 297 would permit German private property in the United States to be used to pay the claims of American nationals against enemy countries other than Germany, thus applying the property of A to the payment of the debt of B, in plain violation of all American legal conceptions.

B. By supplementing it:

The supplemental engagements are the natural ones, providing first—(Peace Resolution and Treaty) that German property which has come into possession or under control of or has been the subject of a demand by the United States "shall be retained and no disposition thereof made" until Germany shall have "made suitable provision for the satisfaction of all claims" of American nationals; and second—(Agreement) the amount of the American claims shall be ascertained in the manner agreed upon.

Obligations imposed upon the United States.

By Art. 297, the United States would be obliged either (1) to return German property or the proceeds of liquidation thereof to the former owners; or (2) to apply the same in payment of the claims of American nationals against Germany with any resulting balance left over going to Reparation account under Art. 243; or (3) if it retained the property or proceeds of liquidation, in whole or in part, to pay the value of that retained to the Reparation Commission under Art. 243. The result once more would be to impair the provision of the Trading with the Enemy Act quoted above.

Obligations Imposed Upon the United States.

Neither the Peace Resolution nor the Berlin Treaty nor the Agreement of August 10, 1922, impose any new obligations upon the United States. Obligations previously resting upon the United States are left as before. Options and reserved rights to make future decisions (as, for instance, in the Trading with the Enemy Act, Sec. 12) continue to be reserved under these documents.

Method of Ascertaining Amount of Claims.

(Art. 297 (e) and Annex (4).)

Amount would be determined by Mixed Arbitral Tribunal provided for in Sec. VI of Part X, Art. 304 of Versailles Treaty or by an arbitrator appointed by said Tribunal or by an arbitrator appointed by Mr. Gustave Ador.

Method of Ascertaining Amount of Claims.

(Agreement, Art. II.)

Each Government appoints one commissioner. The two Governments jointly appoint an umpire to decide cases in which the commissioners disagree.

Procedure of Ascertaining Amounts.	*Procedure of Ascertaining Amounts.*
No provision contained in Art. 297 or its Annex. Sec. VI contains some provisions regarding the procedure of the Mixed Arbitral Tribunal but no provisions regarding procedure before arbitrators appointed by Mr. Ador.	(Agreement, Art. IV.) The commissioners keep accurate records. (Art. VI) Each Government may be represented by agents and counsel who may present oral and written argument.
Time Limitations for Presenting Claims.	*Time Limitations for Presenting Claims.*
Under Art. 297 and Annex, none.	Under diplomatic notes appended to agreement, six months.
Applying German Private Property to Payment of Reparation Obligations of German Government.	*Applying German Private Property to Payment of Reparation Obligations of German Government.*
Art. 297 requires the application of German private property to these obligations, which are set forth in Annex 1 to Art. 243, after satisfying prior claims, unless the property or its proceeds is paid back to its owners. Attention is especially called to military pensions, maintenance of prisoners of war, and allowances to families of soldiers, etc., as defined in paragraphs 5-7 of said Annex, which are included in the reparation obligations of the Treaty of Versailles.	In Ambassador Houghton's note appended to the Agreement, it is distinctly stated that the pensions, maintenance charges and family allowances mentioned in the opposite column under this heading are excluded. Our Ambassador's note, read in connection with the German Chancellor's note to him which called it forth, raises a strong presumption that all reparation claims are excluded, as these notes limit American claims to those covered by the Treaty of August 25, 1921, which is silent as regards reparation.

Place and Time of Meeting of Arbitrators.	*Place and Time of Meeting of Arbitrators.*
Not definied by Art. 297 or its Annex.	According to Agreement, Art. III, the commissioners are to meet at Washington within two months from the coming into force of the agreement.
Expenses.	*Expenses.*
No provision in Art. 297 or its Annex.	Agreement, Art. V, each Government bears its own individual expenses. Joint expenses are shared equally.
Contemporaneous Construction as Evidenced by Acts of the United States.	*Contemporaneous Construction as Evidenced by Acts of the United States.*
In annexing to the Resolution ratifying the Berlin Treaty the reservation previously quoted, the United States plainly showed its intention not to subject itself to the power or authority of the Mixed Arbitral Tribunal, of Mr. Gustave Ador, or any appointee of his, or of the Reparation Commission. The law of the United States forbids that the United States shall have aught to do with any of these agencies unless and until an Act of Congress expressly authorizes it.	The Court will take judicial notice of the fact that a Mixed Claims Commission and umpire are now functioning, having been holding sessions in Washington for a long period of time past and having handed down a number of important decisions, and being now, it is said, approaching the end of their labors, by the conclusion of the matters referred to them by the two Governments for settlement.

It is respectfully submitted that the Court cannot read the above matter, set forth in parallel columns, and fail to reach the conclusion that the American plan is so inconsistent with the plan of the Treaty

of Versailles that the latter document must be laid aside and the decision of the Court based on the American law.

To refer once more to the various classifications as stated in the Treaty of Versailles, if the American law, set forth in the right-hand column above, is studied, it appears that the United States is not in either of the three classes established by Art. 297. The situation of the United States is different from all three. The United States has maintained intact the individual claims of Germans for property taken into custody and the proceeds of such as has been sold, carrying in the office of the Alien Property Custodian a separate trust account for each individual whose property was taken under the Trading with the Enemy Act. The United States has not confiscated these accounts, nor applied them to the payment of American claims against Germany, nor provided for paying them into the reparation fund. As a matter of fact the United States has already provided for a return of a considerable part of the seized property, and for the payment of interest on the part not returned. Sec. 9 of the Trading with the Enemy Act was amended by an Act passed March 4, 1923, Ch. 285, Sec. 2. (42 Stats. part 1, p. 1511). The Amendment provides (subdivision 9) for the return to former enemies of property taken by the Alien Property Custodian, or the proceeds of property sold, if the same does not exceed $10,000 in value, and if it does exceed that sum, then for the payment of $10,000 on account. Furthermore, by the same enactment, the Alien Property Custodian is directed to pay to former enemies "the net income, dividend,

interest, annuity or other earnings, accruing and collected thereafter on any property *held in trust for such person* by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian," (Italics are counsel's), provided that the amount of interest to be paid to any single person shall not exceed $10,000 per annum. The Court will take judicial notice that pursuant to this authority the Alien Property Custodian has already paid out large sums of money in several thousand individual cases, and is continuing to do as rapidly as claims can be properly checked up and verified. Meanwhile the United States holds accounts in excess of $10,000 subject to the future action of Congress pursuant to the rights reserved in Sec. 12 of the Trading with the Enemy Act. This procedure is independent of the three alternative plans provided for in Art. 297 of the Treaty of Versailles and different from all of them, and serves to prove once more that the United States is not governed by the provisions of that Article relating to liquidation of enemy property. By plain implication Congress discloses that the United States is trustee of the funds held by the Alien Property Custodian, and that the Germans whose property was taken in charge by the Custodian are the beneficiaries of this trust—a situation wholly incompatible with the confiscatory provisions of the Treaty of Versailles.

CONCLUSION.

While its Government and ours were at peace appellant brought into our harbors, as ports of refuge, to escape capture by its then enemies, 29 ships. Later appellant's Government and ours came also to be at war, and the United States acquired possession and absolute ownership of the ships by measures taken in pursuance of a law which, without distinction, authorized the taking of vessels belonging to citizens, to allies, to neutrals, and to enemies; *making the test of the right to take, not enemy ownership at the time of taking, but German ownership at the time—two and a half years earlier—of entrance into our waters.*

At the conclusion of the war, the appellant's Government and the Governments of certain of the Allied Powers entered into a treaty in which the United States did not join and the provisions of which do not, in any event, extend to the ships which the United States acquired from appellant.

Appellant, relying upon Section 145 of the Judicial Code granting general jurisdiction to the Court of Claims, and Section 155 authorizing aliens to maintain suits in that Court if their Government accords a like right to American citizens, brought this suit after peace had been restored between the two countries.

The narrow question on which the case turned in the Court below was this: "Had the Court jurisdiction to entertain the suit?" But the case necessarily involves the broader question: "Were appellant's ships confiscated?" The Court below said that it was not necessary to answer this question. If, how-

ever, the decision of that Court is affirmed, the question is answered, and necessarily answered in the affirmative.

The Joint Resolution does not provide for confiscation. Members of Congress debating the measure expressly said that it was not a confiscatory act, but that compensation would be paid and that the Court of Claims would be open to the ship owners as soon as peace should be restored. This was a natural presumption, as war, in its effect upon relations between private parties, has for a long time uniformly been held not to annul or destroy rights of action, but merely, while it endures, to suspend them; and sections 145 and 155 of the Judicial Code afford no ground for supposing that the Government, when waiving its sovereign immunity and consenting to be sued, intended that any other rule should apply in suits against it.

A high official of the State Department has since said that the measure "contemplates the payment of compensation." Secretary of State Hughes, reaffirming the declarations of earlier American statesmen, has declared that all nations are bound to respect the property rights which foreigners acquire by bringing property into the country lawfully in time of peace. In the *Chemical Foundation* suit the United States has contended that its policy in the late war was not a confiscatory one.

It is impossible to exclude appellant from the Court of Claims on the ground that the taking was a tort. It was done under orders of the Executive head of the Government, who was duly authorized by an Act of Congress. This renders the tort theory impossible. It was contended in the Court below

that the Treaty of Versailles, the Peace Resolution of July 2, 1921, and the Treaty of Berlin constituted a bar to the action, but that contention has been shown to be groundless.

On the part of the appellant it has been shown that its ships were taken by process of eminent domain, and that such a taking entitles it to compensation, unless it is to be held that, *ipso facto,* and without a word from Congress, the property of aliens situate in this country is upon the outbreak of war between our country and theirs immediately deprived of the protection of the Constitution and laws. This, in effect and at bottom, is the doctrine enunciated by the Court below. It runs contrary to the decision of this Court in *Brown v. U. S.* and to what our statesmen from Hamiilton to Hughes have declared to be the law and policy of this country. For this Court to set the seal of its approval upon such a doctrine would be equivalent to the United States giving notice to the world that when it becomes involved in war with any country, the property of citizens of that country situate here is to be regarded as no better than booty, and that even though Congress shall pass an Act which in the same words gives the executive discretionary power to take such property and like property belonging to citizens, and requires an appraisal of anything taken which "shall be competent evidence in all proceedings on any claim for compensation," the courts will, despite the statute, hold an enemy owner to be without a remedy or a forum, even after peace has been restored. It would also be notice to the world that the doctrine of *Brown v. U. S.* is no longer in force, and that instead of enemy private property being entitled to

the protection of law unless Congress declares otherwise, it is to be considered as deprived of the protection of law even although Congress, by plain implication, extends such protection to it. It would be notice also that the rules adopted at the Second Hague Conference are, in practice, rejected here, although the United States refused to approve them at the time of their adoption for the reason that what they accorded to private enemy ships as privileges, the United States already looked upon as *rights*. In a word, an affirmance of the decision of the Court below upsets all conceptions hitherto held concerning the law and the policy of the United States as respects the treatment to be accorded the property of foreigners, situate here, in the event of war between our country and theirs.

For the reasons stated, it is respectfully submitted that the decision of the Court of Claims ought to be reversed.

EDGAR W. HUNT,
Counsel for Appellant.

APPENDIX "A"

EXTRACTS FROM DEBATES ON JOINT RESOLUTION No. 42.

Congressional Record, Vol. 55, Part 2, 65th Congress, First Session, May 7, 1917.

Mr. Alexander, Chairman of the House Merchant Marine Committee, said, on page 1903:

> "We could compensate the Hamburg-American and the North German Lloyd Steamship Companies for these ships; if we pursue our policy in the future as in the past we will compensate these owners for these vessels, but at this time, early in the war, and with conditions changing from day to day, the equities shifting, it will be time enough, in the view of the Senate and in the view of the administration and in the view of the Committee on the Merchant Marine and Fisheries, to adjust these equities after peace has been declared, because in the meantime we will no doubt have property destroyed; we will have counter claims against Germany; and it will be time enough to do so then."

He concludes his statements, on page 1909, by saying:

> "It should be evident to all mankind that our Government, in the conduct of the present war, will be governed by those broad principles of humanity and justice that have given luster to our flag."

Mr. Rowe of New York says, on page 1919:

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take real estate in my State

and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.

"There is no man in this House to-day that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will be paid. We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government before this war is closed."

Mr. Stafford of Wisconsin states, on page 1919:

"I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships, but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships."

He further adds, on page 1919:

"It is so well established in international law that the property of foreign subjects domiciled in this country at the outbreak of war is beyond seizure, except for the purposes of the Government, and if taken by the Government they must be compensated for it. That principle is akin to that providing compensation for these interned ships; that being interned here, the owners not having the privilege of leaving port except by rushing into the jaws of destruction, are entitled to have their rights conserved and recognized in the courts of this country. And I make this

claim, that if Germany accords to our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accords them reciprocal rights, then these foreign subjects, upon the seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property. I shall not take up the time to call the attention of the committee to the clauses under the judicial code that authorize such procedure. In another body, when this resolution was suddenly presented for consideration, reference was made to the case of United States against Russell, Thirteenth Wallace, page 623, as justifying our action in appropriating these private vessels. I wish to read from that decision, which has been many times referred to approvingly in subsequent decisions of the Supreme Court, and to call attention to the principle which I am enunciating here, that if we confiscate this property for war's ends—and I claim that is the only justification, because of the need at the present time to assist our Government in this war in the transportation of munitions and troops—then we must recognize the rights of property, and the owners are entitled to be reimbursed by our Government."

He states further, on pages 1919 and 1920:

"Undoubtedly we would have a right to confiscate them if they were public vessels of the enemy, but as these vessels are the private property of subjects of the alien country, we

should in conscience reimburse them, just as under international law we are bounden to reimburse Germans or Austrians in this country in case the Government should have need to take for war purposes any of their private property. Why, no one claims that bonds, money, or any other property of foreigners domiciled in this country can be taken by the Government without the owners being compensated. If the Government would appropriate the product of a woolen mill owned by German aliens domiciled here, the Government would certainly be obligated to pay for the property taken. The mere fact that the woolen goods were seized by German warships as contrabrand would not impair the rights of the original owner to compensation for his property. So with these private vessels, though they are movable, nevertheless they are private personal property. They are the private property of these stockholders, just as bonds owned by enemy aliens in this country are their private property; and if perchance they are destroyed by a submarine attack of the enemy that does not destroy the rights of these alien owners to their rights of property, which are recognized in international law.

"Under this resolution, exercising the war powers of Congress, we are appropriating the property of foreign subjects, but I contend that we should compensate them for that property. And no matter what consequences may befall the use of that property, we are appropriating it for the use of the Government, and their private rights can not be affected by a use over which it has no control."

Mr. Bankhead interrupted Mr. Stafford to ask, on page 1920:

"I will ask the gentleman from Wisconsin if he can find in either one of the sections of the joint resolution as reported to the House a denial of the principle he is arguing for?"

Mr. Stafford replied, on page 1920:

"The bill provides, in section 2, for the means whereby the Secretary of the Navy may appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas confirmed that the power then exercised was the power of eminent domain, page 1921:

"This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen, and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

He added, page 1921:

"Section 2 provides for a survey and estimate of the value of the ships taken over. It does it in order that that survey might be held as prima facie evidence of the facts; that is, of the value of the ships when taken over. It does not undertake to decide the matter or manner of compensation now."

* * * * *

"I want to say that, so far as our policy as a nation is concerned, from its foundation it

has never been a policy of ruthless power. We have never intended, never desired, and never will desire to wrongfully take the property of citizens of any nation, even though we are at war with that nation. It has been our policy that any property which comes rightfully within our jurisdiction will have all of the rights of its owner preserved, and when this war is ended there will not be a German right which will be violated by the American people, and I believe I know this Congress well enough to know that it will never use its power to take from any man, German, Austrian, Englishman, Frenchman, or American, any right that justly belongs to him, but we do not propose to settle up the claims that should be settled by the German Government for and with its citizens before we know what Germany will do with American rights."

He states, on page 1922:

* * * "but it is a well-recognized fact that under the right of eminent domain the Government takes the things necessary for its defense."

Mr. Small of North Carolina states, on page 1922:

* * * "I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time."

He also states, on page 1922:

"Mr. Chairman, the President has said, and I take it it is the sentiment of every intelligent

and just-minded citizen in our country, that the private property of alien enemies within the United States shall be scrupulously respected and preserved. These ships in large degree, if not altogether, are the property of residents or citizens of the Imperial German Government. Simply because this property consists of ships instead of money in bank or real estate located here, or buildings, or movable personal property, does not in my mind differentiate them so as to apply a rule of right to one and not to the other."

Mr. Edmunds of Pennsylvania says, on page 1923:

"I am sure there was no intention to confiscate this property. It was simply left open for adjudication at an early date."

* * * * *

"We take the ships. We have arranged to leave the question of compensation open. The treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in the Court of Claims, where they have a right to take it.

"In the case of Wagner against The *Juniata,* Twenty-eight Federal Cases, page 3821, the Court reaffirming the principle stated by Chief Justice Marshall, said:

" 'In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the Court equally strong against the claim of the libellant; she is to all intents and purposes property as much infra-territorial, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States than

the river upon whose waters she is now floating.'

"Now, gentlemen, undoubtedly the committee, realizing that the Government needed these ships, has taken the best course that it is possible to devise to take possession of them at this time, and has left the question entirely as to how they were to be settled for open for the future."

* * * * *

"Now, gentlemen, you will see that the House and the Congress has at all times stood for fair compensation for anything it has taken belonging to anybody else, whether belonging to our own citizens or to foreign citizens. I think we can afford to pass this resolution and leave it to the Court to pass upon in due time what we are to pay for these ships."

Mr. Slayden of Texas says, on pages 1923 and 1924:

"The purpose of Article XIII was to mitigate the horrors of war and to compel respect for the rights of property of private citizens and to secure decent treatment for individuals forced to reside in an enemy country.

"I am convinced that section 2 of this resolution designedly recognizes that obligation in the words that permit a board of survey to be appointed to value this property that we are about to appropriate to our military use.

"It is a recognition of the fact that the obligations of the three treaties to which I have referred—of 1785, 1799 and 1828—still bear on us, are still to be respected in principle; and I am delighted to know that the chairman of the committee (Mr. Alexander) was wise enough to have those obligations recognized in the way he did, and incorporated in the resolution itself."

He concludes his remarks, on page 1924:

"We cannot build up civilization, we cannot provide anything like a reasonable scheme for the maintenance of peace between the governments of the world unless we do respect that principle; and I would like to have it known to the whole world that it is the opinion of the American Congress, without additional legislation being necessary, that private property rights that were undertaken to be cared for in the three treaties I have mentioned are to be respected, and that the United States, at least, is going to conduct its war upon the basis of justice to private citizens; and that after the war is over we stand willing actually, in spirit and in fact, to help the world re-establish itself on a basis of sanity, and meantime we are going to keep the faith to which we are plighted.

"Mr. Chairman, the fact that treaties have been broken and that people who were our friends have now for the time being become our enemies ought not to cause us to set aside all the decent and well-conceived laws of the past for the recognition of their rights and the governing and protection of personally innocent and unoffending individuals. The most distressing feature of the situation in this country is the intolerant spirit shown by some of our people. Regardless of treaties I have heard a demand that we should take the property of Germans in the United States. Because a man has the temerity to stand up and plead for justice to citizens of an enemy country, who unfortunately happen to be here, he is frequently denounced as pro-German; because he merely stands for reason, for common sense and for recognition of the principles that this Government has stood for from the be-

ginning, and which I am proud to say I believe it will stand for until the end. These intolerant people, these people who believe it to be the duty of every citizen to hate the individuals of another country with which his is engaged in war, have been manifesting a hostility that is not creditable to them as men, and certainly if shared in by this Government as a political entity will reflect no credit upon it."

Mr. Hadley of Washington says, on page 1924:

"I desire to draw the attention of the committee directly to what the resolution provides in terms. It provides that the Secretary of the Navy shall appoint a board, with the approval of the President, to make a survey of the vessels which it is proposed to take over, with a view to determining their actual value at the time they are taken; and not only the vessels but the equipment and appurtenances and all property contained therein at the time of the taking. And what is the purpose of that survey? It is in order that it be preserved as a permanent record for future use in the event it should become necessary to consider the question of compensation. It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution.

"It is true that the resolution does not in terms declare that compensation shall be paid. It is equally true that it does not either declare or intimate that compensation shall not be paid. It simply provides the present machinery whereby the evidence of value shall not only be ascertained but that it shall be preserved; and having been ascertained and preserved, it makes it mandatory, in the terms of

the resolution, that such evidence shall be recognized as competent proof in any court having jurisdiction."

* * * * *

* * * "In addition to the preservation of the record for court procedure, it will be useful in the determination of questions arising on the treaty of peace that may be entered into at the conclusion of the war, and, as suggested by the gentleman from Texas, will show the resolution and purpose on the part of the Government to recognize the claim for damages in case the party has a right to it."

He also states, on page 1925:

* * * "I hope, gentlemen, considering the resolution will not lose sight of the fact that, while the committee did not attempt to provide the machinery for the final solution and determination of the matter, it did not ignore the fact that compensation might be had."

Mr. Campbell of Kansas states, on page 1925:

"I do not agree that any settlement should be made at this time with the owners of these ships; but the owners of these ships need have no fear; they need not look forward to a time when the war shall have been ended to any difficulty they will have in getting justice from the United States. As to whether or not these ships shall become the victims of submarines at the hands of the German Government raises a question that will no doubt enter into the settlement of the matter of the payment for these ships; but the Government of the United States has always maintained its position of adhering with the strictest account to every treaty that it has entered into and to every obligation that it has assumed or that is thrust upon it, and that will be true with respect to

these ships and to every incident growing out of this war as it has with respect to every other. The owners of the ships and the German Government may well look back to the action of the United States at the termination of the Spanish-American War, when this Government did more than was really expected of it by the vanquished."

* * * * *

"That is all I had in mind to say, and I would not have stated it if it had not been that it has seemed to me there has been some anxiety here for fear that the Government of the United States would take advantage of its power in the premises and in the final conclusion not do justice by the owners of any property it may seize for war purposes."

Mr. Lenroot of Wisconsin says, on page 1929:

"I do not say for a moment that we ought not to compensate the owners of these ships."

Mr. Fess of Ohio states, on page 1930:

"But the second section suggests that it is to be requisition, or at least it lays the grounds for it, since it there provides for a board of survey to ascertain the values of these vessels. It does not specify just why that is done, but all of us understand that in case it is to be adjudicated on the question of value, this Government by this provision shows clearly its intention not to take any advantage of the owners of these vessels.'"

He adds, on page 1932:

* * * "There are so many questions that have come up that I am perfectly willing and shall freely vote to take these vessels, their title and possession, with the understanding that the Government is to operate or lease them or charter them and equip them, and

then I hope that our Government, following the second section here, will proceed upon the basis that all rights of all people and of all citizens, of whatever nationality, will be regarded and respected, for our Government is too big to do anything else."

Mr. McFadden says, on page 1932:

* * * "If, on the other hand, the real ownership of these boats is not vested in the German Government, I am interested just to the extent to see that confiscation of private property is not had by this Government without some basis of settlement being provided for eventually. I do not say at this time, but eventually, but believe the law should be made very specific now; and in that connection I want to quote a statement which was made by the State Department, with the authority of the President, on February 8, 1917, in which it stated:

" 'The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and the subjects of foreign States.'

"Then I also want to quote from the Presiden't message to this Congress on April 2, in which he said this:

" 'Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.

" 'It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus.'

"This is a war measure and warranted by the exigencies of the case; but, however grave the situation, shipping that came to our ports in the legitimate prosecution of ocean traffic, the property of individuals and companies, should not be seized without rendering at the proper time just compensation therefor."

* * * * *

* * * "but, on the other hand, if it is finally determined that these boats are the property of individual citizens of Germany, after the war is over that prompt and full settlement will be provided for to the individual citizen."

APPENDIX "B"

PERTINENT PROVISIONS OF VERSAILLES TREATY

Part VIII.

"REPARATION.

"Section 1.

"GENERAL PROVISIONS.

"ARTICLE 231.

"The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

"ARTICLE 232.

"The Allied and Associated Governments recognize that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present treaty, to make complete reparation for all such loss and damage.

"The Allied and Associated Governments, however, require, and Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto.

"In accordance with Germany's pledges, already given, as to complete restoration for Belgium, Germany undertakes, in addition to the compensation for damage elsewhere in this Part provided for, as a consequence of the violation of the Treaty of 1839, to make reimbursement of all sums which Belgium has borrowed from the Allied and Associated Governments up to November 11, 1918, together with interest at the rate of five per cent. (5%) per annum on such sums. This amount shall be determined by the Reparation Commission, and the German Government undertakes thereupon forwith to make a special issue of bearer bonds to an equivalent amount payable in marks gold, on May 1, 1926, or, at the option of the German Government, on the 1st of May in any year up to 1926. Subject to the foregoing, the form of such bonds shall be determined by the Reparation Commission. Such bonds shall be handed over to the Reparation Commission, which has authority to take and acknowledge receipt thereof on behalf of Belgium.

"ARTICLE 233.

"The amount of the above damage for which compensation is to be made by Germany shall be determined by an Inter-Allied Commission, to be called the *Reparation Commission* and constituted in the form and with the powers set forth hereunder and in Annexes II to VII, inclusive, hereto.

"This Commission shall consider the claims and give to the German Government a just opportunity to be heard.

"The findings of the Commission as to the amount of damage defined as above shall be concluded and notified to the German Gov-

ernment on or before May 1, 1921, as representing the extent of that Government's obligations.

"The Commission shall concurrently draw up a schedule of payments prescribing the time and manner for securing and discharging the entire obligation within a period of thirty years from May 1, 1921. If, however, within the period mentioned, Germany fails to discharge her obligations, any balance remaining unpaid may, within the discretion of the Commission, be postponed for settlement in subsequent years, or may be handled otherwise in such manner as the Allied and Associated Governments acting in accordance with the procedure laid down in this Part of the present Treaty, shall determine."

" ARTICLE 236.

Germany further agrees to the direct application of her economic resources to reparation as specified in Annexes III, IV, V, and VI, relating respectively to merchant shipping, to physical restoration, to coal and derivatives of coal, and to dye-stuffs and other chemical products; provided always that the value of the property transferred and any services rendered by her under these Annexes, assessed in the manner therein prescribed, shall be credited to her towards liquidation of her obligations under the above Articles.

"ARTICLE 237.

The successive installments, including the above sum, paid over by Germany in satisfaction of the above claims will be divided by the Allied and Associated Governments in proportions which have been determined upon by them in advance on a basis of general equity and of the rights of each.

For the purposes of this division the value of property transferred and services rendered under Article 243, and under Annexes III, IV, V, VI, and VII, shall be reckoned in the same manner as cash payments effected in that year.

"ARTICLE 242.

The provisions of this Part of the present Treaty do not apply to the property, rights and interests referred to in Sections III and IV of Part X (Economic Clauses) of the present Treaty, nor to the product of their liquidation, except so far as concerns any final balance in favour of Germany under Article 243 (a).

"ARTICLE 243.

The following shall be reckoned as credits to Germany in respect of her reparation obligations:

(a) Any final balance in favour of Germany under Section V (Alsace-Lorraine) of Part III (Political Clauses for Europe) and Sections III and IV of Part X (Economic Clauses) of the present Treaty;

• • •

(c) Amounts which in the judgment of the Reparation Commission should be credited to Germany on account of any other transfers under the present Treaty of property, rights, concessions or other interests."

• • •

"ARTICLE 244.

"ANNEX I.

"Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

"(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or mal-treatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or being forced to labour), wherever arising, and to the surviving dependents of such victims.

"(3) Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims.

"(4) Damage caused by any kind of maltreatment of prisoners of war.

"(5) As damage caused to the peoples of the Allied and Associated Powers, all pensions and compensation in the nature of pensions to naval and military victims of war (including members of the air force), whether mutilated, wounded, sick or invalided, and to the dependents of such victims, the amount due to the Allied and Associated Governments being calculated for each of them as being the capitalized cost of such pensions and compensation at the date of the coming into force of the present Treaty on the basis of the scales in force in France at such date.

"(6) The cost of assistance by the Government of the Allied and Associated Powers to

prisoners of war and to their families and dependents.

"(7) Allowances by the Government of the Allied and Associated Powers to the families and dependents of mobilized persons or persons serving with the forces, the amount due to them for each calendar year in which hostilities occurred being calculated for each Government on the basis of the average scale for such payments in force in France during that year.

"(8) Damage caused to civilians by being forced by Germany or her allies to labour without just remuneration.

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

"10) Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population."

"ANNEX III.

"(1) Germany recognizes the right of the Allied and Associated Powers to the replacement, ton for ton (gross tonnage) and class for class, of all merchant ships and fishing boats lost or damaged owing to the war.

"Nevertheless, and in spite of the fact that the tonnage of German shipping at present in existence is much less than that lost by the Allied and Associated Powers in consequence of the German aggression, the right thus rec-

ognized will be enforced on German ships and boats under the following conditions:

"The German Government, on behalf of themselves and so as to bind all other persons interested, cede to the Allied and Associated Governments the property in all the German Merchant ships which are of 1,600 tons gross and upwards; in one-half, reckoned in tonnage, of the ships which are between 1,000 tons and 1,600 tons gross; in one-quarter, reckoned in tonnage, of the steam trawlers; and in one-quarter, reckoned in tonnage, of the other fishing boats.

"(2) The German Government will, within two months of the coming into force of the present Treaty, deliver to the Reparation Commission all the ships and boats mentioned in paragraph 1.

"(3) The ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals; or (c) are now under construction (1) in Germany, (2) in other than Allied or Associated countries for the account of any German national, company or corporation.

"(4) For the purpose of providing documents of title for the ships and boats to be handed over as above mentioned, the German Government will:

"(a) Deliver to the Reparation Commission in respect of each vessel a bill of sale or other document of title evidencing the transfer to the Commission of the entire property

in the vessel, free from all encumbrances, charges and liens of all kinds, as the Commission may require;

"(b) Take all measures that may be indicated by the Reparation Commission for ensuring that the ships themselves shall be placed at its disposal.

"(5) As an an additional part of reparation, Germany agrees to cause merchant ships to be built in German yards for the account of the Allied and Associated Governments as follows:

"(a) Within three months of the coming into force of the present Treaty, the Reparation Commission will notify to the German Government the amount of tonnage to be laid down in German shipyards in each of the two years next succeeding the three months mentioned above.

"(b) Within two years of the coming into force of the present Treaty, the Reparation Commission will notify to the German Government the amount of tonnage to be laid down in each of the three years following the two years mentioned above.

"(c) The amount of tonnage to be laid down in each year shall not exceed 200,000 tons, gross tonnage.

"(d) The specifications of the ships to be built, the conditions under which they are to be built and delivered, the price per ton at which they are to be accounted for by the Reparation Commission, and all other questions relating to the accounting, ordering, building and delivery of the ships, shall be determined by the Commission.

"Germany undertakes to restore in kind and in normal condition of upkeep to the Allied and Associated Powers, within two months

of the coming into force of the present Treaty, in accordance with procedure to be laid down by the Reparation Commission, any boats and other movable appliances belonging to inland navigation which since August 1, 1914, have by any means whatever come into her possession or into the possession of her nationals, and which can be identified.

"With a view to make good the loss in inland navigation tonnage, from whatever cause arising, which has been incurred during the war by the Allied and Associated Powers, and which cannot be made good by means of the restitution prescribed above, Germany agrees to cede to the Reparation Commission a portion of the German river fleet up to the amount of the loss mentioned above, provided that such cession shall not exceed 20 per cent. of the river fleet as it existed on November 11, 1918.

"The conditions of this cession shall be settled by the arbitrators referred to in Article 339 of Part XII (Ports, Waterways and Railways) of the present Treaty, who are charged with the settlement of difficulties relating to the apportionment of river tonnage resulting from the new international regime applicable to certain river systems or from the territorial changes affecting those systems.

"(7) Germany agrees to take any measures that may be indicated to her by the Reparation Commission for obtaining the full title to the property in all ships which have during the war been transferred, or are in process of transfer, to neutral flags, without the consent of the Allied and Associated Governments.

"(8) Germany waives all claims of any description against the Allied and Associated Governments and their nationals in respect

of the detention, employment, loss or damage of any German ships or boats, exception being made of payments due in respect of the employment of ships in conformity with the Armistice Agreement of January 13, 1919, and subsequent Agreements.

"The handing over of the ships of the German mercantile marine must be continued without interruption in accordance with the said Agreement.

"(9) Germany waives all claims to vessels or cargoes sunk by or in consequence of naval action and subsequently salved, in which any of the Allied or Associated Governments or their nationals may have any interest either as owners, charterers, insurers or otherwise, not withstanding any decree of condemnation which may have been made by a Prize Court of Germany or of her allies.

"PART X.

"ECONOMIC CLAUSES.

"SECTION IV.

"PROPERTY, RIGHTS AND INTERESTS.

"ARTICLE 297.

"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

"(a) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation

has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.

"(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

"The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State.

"German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.

"(c) The price or the amount of compensation in respect of the exercise of the right referred to in the preceding paragraph (b) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

"(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures

of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

"(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

"(f) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in German territory and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (e) shall be satisfied by the restitution of the said property if it still exists in specie.

"In such case Germany shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

"If the restitution provided for in this paragraph cannot be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (e) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights or interests of which he was deprived.

"Through restitution in accordance with this Article, the price or the amount of compensation fixed by the application of paragraph (e) will be reduced by the actual value of the property restored, account being taken of compensation in respect of loss of use or deterioration.

"(g) The rights conferred by pargaraph (f) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights or interests were not applied before the signature of the Armistice.

"(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in gen-

eral all cash assets of enemies, shall be dealt with as follows:

"(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.

"(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

"In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 235 and 260, be

paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal, provided for by Sec VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

"(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

(j) The amount of all taxes and imposts upon capital levied or to be levied by Germany on the property, rights and interests of the nationals of the Allied or Associated Powers from November 11, 1918, until three months from the coming into force of the present Treaty, or, in the case of property, rights or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty, shall be restored to the owners."

"ANNEX.

"1.

"In accordance with the provisions of Article 297, paragraph (d), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursu-

ance of war legislation with regard to enemy property, rights and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of the country in which the property is situated by nationals of the Allied and Associated Powers.

"The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the German authorities in invaded or occupied territory, nor to such of the above-mentioned measures as

have been taken by Germany or the German authorities since November 11, 1918, all of which shall be void.

"2.

"No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

"3.

"In Article 297 and this Annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or

courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the the cancelling of titles or securities.

"4.

"All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the

second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

"5.

"Notwithstanding the provisions of Article 297, where immediately before the outbreak of war a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Germany to the use of trade-marks in third countries, or enjoyed the use in common with such company of unique means of reproduction of goods or articles for sale in third countries, the former company shall alone have the right to use these trademarks in third countries to the exclusion of the German company, and these unique means of reproduction shall be handed over to the former company, notwithstanding any action taken under German war legislation with regard to the latter company or its business, industrial property or shares. Nevertheless, the former company, if requested, shall deliver the latter company derivative copies permitting the continuation of reproduction of articles for use within German territory.

"6.

"Up to the time when restitution is carried out in accordance with Article 297, Germany is responsible for the conservation of property, rights and interests of the nationals of Allied or Associated Powers, including companies and associations in which they are interested, that have been subjected by her to exceptional war measures.

"7.

"Within one year from the coming into force of the present Treaty the Allied or Associated Powers will specify the property, rights and interests over which they intend to exercise the right provided in Article 297, paragraph (f).

"8.

"The restitution provided in Article 297 will be carried out by order of the German Government or of the authorities which have been substituted for it. Detailed accounts of the action of administrators shall be furnished to the interested persons by the German authorities upon request, which may be made at any time after the coming into force of the present Treaty.

"9.

"Until completion of the liquidation provided for by Article 297, paragraph (b), the property, rights and interests of German nationals will continue to be subject to exceptional war measures that have been or will be taken with regard to them.

"10.

"Germany will, within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

"Germany will at any time on demand of any Allied or Associated Power furnish such

information as may be required with regard to the property, rights and interests of German nationals within the territory of such Allied or Associated Power, or with regard to any transactions concerning such property, rights or interests effected since July 1, 1914.

"11.

"The expression 'cash assets' includes all deposits or funds established before or after the declaration of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but does not include sums belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

"12.

"All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

"13.

"Within one month from the coming into force of the present Treaty, or on demand at any time, Germany will deliver to the Allied and Associated Powers all accounts vouchers, records, documents and information of any kind which may be within German territory, and which concern the property, rights and interests of the nationals of those Powers, including companies and associations in which

they are interested, that have been subjected to an exceptional war measure, or to a measure of transfer either in German territory or in territory occupied by Germany or her allies.

"The controllers, supervisors, managers, administrators, sequestrators, liquidators and receivers shall be personally responsible under guarantee of the German Government for the immediate delivery in full of these accounts and documents, and for their accuracy.

"14.

"The provisions of Article 297 and this Annex relating to property, rights and interests in an enemy county, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

"In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section IIIrespecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.

"15.

"The provisions of Article 297 and this Annex apply to industrial, literary and artistic property which has been or will be dealt with

in the liquidation of property, rights, interests, companies or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (b)."

APPENDIX "C"

TREATY OF BERLIN

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force according to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles,

have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

* * * *

"Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Gov-

ernment, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of war:

Have for that purpose appointed their plenipotentiaries:

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. FRIEDRICH ROSEN, Minister for Foreign Affairs, and

THE PRESIDENT OF THE UNITED STATES OF AMERICA

ELLIS LORING DRESEL, Commissioner of

the United States of America to Germany,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Germany undertakes to accord to the United States and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

ARTICLE II.

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty

including those mentioned in Paragraph (1) of this Article, which relate to the Covenant of the League of Nations, nor shall the United States be bound by any action taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give its assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

ARTICLE III.

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August, 1921.

ROSEN. (SEAL)
ELLIS LORING DRESEL. (SEAL)

APPENDIX "D"

Claims Agreement Between The United States and Germany.

"Agreement between the United States and Germany for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two Governments on August 25, 1921. Signed at Berlin August 10, 1922.

"AGREEMENT.

"The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

"The PRESIDENT OF THE UNITED STATES OF AMERICA, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and THE PRESIDENT OF THE GERMAN EMPIRE, Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

"ARTICLE I.

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals.

"ARTICLE II.

"The Government of the United States and the Government of Germany shall each appoint one commission. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

"ARTICLE III.

"The commissioners shall meet at Washington within two months after the coming in-

to force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

"ARTICLE IV.

"The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

"The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

"ARTICLE V.

"Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moities.

"ARTICLE VI.

"The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

"The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

"The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

"ARTICLE VII.

"The present agreement shall come into force on the date of its signature.

"IN FAITH WHEREOF, the above-named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

"Done in duplicate at Berlin this tenth day of August, 1922.

"(Seal) ALANSON B. HOUGHTON,
"(Seal) WIRTH."

"(EXCHANGE OF NOTES.)

"(The German Chancellor to the American Ambassador at Berlin.) (Translation.)

"Foreign Office.
"No. III A 2451.
"Mr. Ambassador,

Berlin, August 10, 1922.

"In reply to your kind note of June 23, 1922, I have the honor to state to your Excellency as follows:

"The German Government is in agreement with the draft of an agreement communicated to it in the note mentioned, now that some changes in the text have been agreed upon with your Excellency. I have the honor to transmit herewith the draft modified accordingly.

"From the numerous conferences which have taken place with your Excellency, the German Government believes itself justified in assuming that it is not the intention of the American Government to insist in the proceedings of the Commission upon all the claims contemplated in the Versailles Treaty without exception, that it in particular does

not intend to raise claims such as those included in Paragraphs 5 to 7 of Annex 1 of Article 244 of the Versailles Treaty (claims for reimbursement of military pensions paid by the American Government, and of allowances paid to American prisoners of war or their families and to the families of persons mobilized or indeed claims going beyond the Treaty of August 25, 1921.

"The German Government would be grateful if your Excellency would confirm the correctness of this assumption.

"In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible. In order to insure this it might be expedient to fix a period for the reporting of the claims to be considered by the Commission. The German Government, therefore, proposes that the Commission should consider only such claims as are brought before it within at least six months after its first meeting as provided in Article III of the abovenamed agreement.

"I should be obliged to your Excellency for a statement as to whether the American Government is in agreement herewith.

"At the same time I take advantage of this occasion to renew to you, Mr. Ambassador, the assurance of my most distinguished consideration.

"WIRTH."

"(The American Ambassador at Berlin to the German Chancellor.)

"No. 128. "American Embassy,
"Berlin, August 10, 1922.

"Mr. Chancellor:

"I have the honor to acknowledge the receipt of your note of to-day's date transmitting the draft of the agreement enclosed to you in my note of June 23, as modified as a result of the negotiations that have been carried on between us.

"In accordance with the instructions that I have received from my Government, I am authorized by the President to state that he has no intention of pressing against Germany or of presenting to the Commission established under the claims agreement any claims not covered by the Treaty of August 25, 1921, or any claims falling within Paragraphs 5 to 7 inclusive, of the annex following Article 244 of the Treaty of Versailles.

"With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my Government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

"I avail myself once more of the opportunity to renew to you, Mr. Chancellor, the assurances of my most distinguished consideration.

"A. B. HOUGHTON.

"Dr. Wirth,
"Chancellor of the German Empire,
"Berlin."

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Supreme Court of the United States

~~October Term, 1924~~
~~No. 199~~

October Term, 1925
No. ~~136~~ 350/0

Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (Also Known as Hamburg American Line), Appellant,

vs.

The United States

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S MEMORANDUM.

WILLIAM B. DEVOE,
Attorney for Appellant.

... in the United States by B. H. Tyrrel, Printer, 206 Fulton Street, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 488

OCTOBER TERM, 1925.

No. 116

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

Foreword.

This case is identical in principle with the case of *North German Lloyd* vs. *United States*, which is now pending before this Court as No. 113 of the October, 1925 Term. In the Court below the North German Lloyd and the appellant in the case at bar submitted a joint brief, and both cases were argued on behalf of the respective claimants by the same counsel. For these reasons the appellant in the instant case desires, by agreement of counsel and with the permission of this Court, to submit on the brief filed in this Court by the North German Lloyd in Case No. 113 above referred to. The following memorandum therefore comprises only those allegations which are necessary to set the facts of the

present case before this Court and to show that it has jurisdiction thereof.

OPINION OF COURT BELOW.

The decision of the Court of Claims was embodied in a memorandum accompanying the judgment entered March 17, 1924, dismissing claimant's petition and sustaining defendant's demurrer thereto (R. 6). In this memorandum the Court stated that it had no jurisdiction for the reasons given in its opinion in the case of *Deutsch-Australische Dampfschiffs-Gesellschaft* vs. *United States*, decided simultaneously with the present case (R. 6). Neither this opinion nor the memorandum have been officially reported, but they are set forth at pages 6 to 13 of the Record herein.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment to be reviewed was entered March 17, 1924 (R. 6). The action of the Court below in dismissing the petition of the appellant (claimant below), sustaining defendant's demurrer thereto and ruling that it had no jurisdiction (R. 6) are relied on as the basis of this Court's jurisdiction. This jurisdiction is invoked pursuant to Sections 242 and 243 of the Judicial Code as the same existed prior to the changes effected by the Act of Congress of February 13, 1925. An appeal to this Court was applied for on June 10, 1924 (R. 13) and allowed by the Court of Claims on June 16, 1924 (R. 13). The record on appeal was filed on June 27th, 1924 (R. 14). The appeal was therefore pending in this Court when the Act of February 13, 1925 went into effect, and by Section 14 of that Act appellant's right to invoke the jurisdiction of this Court was not affected by said Act. Numerous cases might be referred to sustaining such jurisdiction, as it existed prior to the Act of February 13, 1925, to hear

cases like the one at bar. One of the most recent and typical of these is the case of *A. W. Duckett & Company* vs. *United States,* 45 Supreme Court Reporter 38. In that case the Court of Claims dismissed claimant's petition for want of jurisdiction, on the ground that no contract could be implied on the part of the United States to compensate claimant (58 Court Claims, 234, 403). An appeal to this Court was sought and allowed, and this Court reversed the judgment, with directions to the Court of Claims to award proper compensation to the appellant. That case is thus closely analogous to the case at bar, and involves the same mode of procedure resorted to here.

STATEMENT OF THE CASE.

This action was brought in the Court of Claims by the appellant (claimant below) to recover from the United States the sum of $139,404.90 representing the aggregate value of various items of personal property belonging to the appellant, which property was taken into the possession and ownership of the United States at various dates between April 17, 1917 and June 24, 1918. The action was commenced by the filing of appellant's petition on April 5, 1923 (R. 1). On February 19, 1924 by leave of Court, appellant filed an amended petition (R. 1). This amended petition alleges substantially as follows:

1. That appellant is a German corporation and citizen and for many years up to and including July 1914 operated steamship services in various parts of the world (R. 1).

2. That in August 1914 these services were discontinued because of the outbreak of the European War; that on April 6, 1917 and at all times thereafter until possession of the said property was taken by the United States, appellant was the owner and in possession of cer-

tain personal property used in connection with its steamship business and then located on certain piers in Hoboken, New Jersey and in the Boroughs of Manhattan and Brooklyn, New York City (R. 1, 2); that at various dates between April 17, 1917 and June 24, 1918 said property was expropriated by the United States acting through the War Department under the authority of the Act of Congress of August 29, 1916, Chap. 418, Sec. 1 (39 Stat. 645) (R. 2).

3. That an inventory of said property was made in March 1918 on behalf of the United States which inventory was filed with the War Department, the Navy Department and the Alien Property Custodian; and that appellant claims all of the property listed in said inventory with the exception of certain floating craft and other items which are specified in appellant's petition (R. 2).

4. That the reasonable aggregate value of the property expropriated by the United States was $139,404.90 (R. 3).

5. That a certain memorandum or minute relating to this property was, on or about June 24, 1918, drawn up by representatives of the United States and of the appellant which memorandum reads as follows (R. 3, 4):

"At a meeting held at the Office of the New York Trust Company, at No. 26 Broad Street, New York City, on June 24th at 3:30 p. m. at which were present: Messrs. W. G. Sickel, Julius P. Meyer and Capt. F. Jarka, representing the Hamburg-American Line; Messrs. Otto T. Bannard, Morgan M. Mann and Gilbert S. McClintock representing the Alien Property Custodian; and Col. A. C. Blunt, Col. F. H. Schoeffel and Paymaster J. Lyman Pratt representing the joint Board of the War and Navy Departments, respectively, and Capt. Lawson Sandford also representing the War Department, there was submitted an inventory, with explanatory notes, consisting

of nineteen pages, showing the movable property including several items on pages eighteen and nineteen, namely: H. A. L. No. 2 Tug Boat, H. A. L. No. 3 Tug Boat, H. A. L. No. 4 Launch, a coal Hoister and three scows belonging to the Hamburg-American Line that had been taken over by the War Department since April 17, 1917, and for which the War Department is responsible.

"This inventory was marked for identification by the signatures of Messrs. Sickel and Meyer of the Hamburg-American Line, Otto T. Bannard for the Alien Property Custodian and Col. Blunt for the Joint Board.

"Capt. Sanford stated that the question as to whether the property was enemy property had been discussed and that the representatives of the Hamburg-American Line had stated that while the original inventory was as of the Hamburg-American Line Terminal and Navigation Co., the property was actually purchased and acquired by the Hamburg-American Line and, therefore, is alien enemy property.

"At the conclusion of the meeting it was agreed that if the Advisory Board subsequently reports favorably to that effect and such report is approved by the War Department, this inventory would be accepted as a list of all the movable property of the Hamburg-American Line in the hands of and chargeable to the War Department at its Hoboken Piers since April 17th, 1917.

(Signed) Otto T. Bannard, for Alien Property Custodian. A. C. Blunt, Lt. Col., U. S. A. W. G. Sickel, for Hamburg-American Line. O. T. B.

"Note.—While the minute provides that the execution of the official documents of record shall be contingent upon the approval, by the Departments concerned, of the recommendations of the Joint Army and Navy Board, it is now mutually agreed that the execution be

accomplished forthwith, if only because of the difficulty of securing the presence of the numerous individuals involved.

"This proceeding in no way alters the status of the parties to the agreement, but serves only to expedite the prompt settlement of the matters involved.

(signed) J. Lyman Pratt, (title illegible)."

6. Appellant's petition sets forth the jurisdictional allegations that its suit is founded on the Constitution, the Act of Congress of August 29, 1916 above referred to, an implied contract with the Government to make compensation, a claim not sounding in tort for unliquidated damages, and an express contract with the Government to pay the reasonable value of said property as evidenced by the memorandum signed by the representatives of the Government above set forth (R. 4). It is further alleged that no compensation has been awarded or paid to appellant (R. 4); that no action has been taken on the claim in Congress nor any request made for such action (R. 4); that appellant is the sole owner of the claim, has made no assignment thereof, is justly entitled to the amount claimed, has no other suit pending based on such claim and has not aided or abetted rebellion against the United States (R. 5). It is also alleged that Germany accords to American citizens reciprocal rights to sue in her courts (R. 1) and that the suit was commenced within six years after the claim accrued (R. 5).

On May 26, 1923, the Government demurred to appellant's petition on the ground that it did not state a cause of action against the United States (R. 5). This demurrer was allowed to stand to the amended petition (R. 5).

On February 18, 19 and 20, 1924, the demurrers in this case and several other cases involving similar ques-

tions were argued and submitted (R. 6), and on March 17, 1924, the Court of Claims rendered judgment sustaining said demurrer and dismissing appellant's petition (R. 6). In an accompanying memorandum that Court stated that it had not jurisdiction, for the reasons set forth in an opinion rendered on the same date in the case of *Deutsch-Australische Dampfschiffs-Gesellschaft* vs. *U. S.* (R. 6). This opinion is printed in full on pages 6 to 13 of the record herein.

Carl L. Schurz, theretofore attorney for the appellant, died May 19, 1924. On June 7, 1924, William B. Devoe, appellant's present attorney, was on motion substituted for Mr. Schurz as appellant's attorney of record (R. 13).

An appeal from the judgment of the Court below was applied for on June 10, 1924 (R. 13) and the appeal was allowed on June 16, 1924 (R. 13). The printed record was filed in this Court on June 27, 1924 (R. 14).

ARGUMENT.

(As stated at the beginning of this memorandum, appellant asks leave to submit on the brief filed in this Court by the North German Lloyd, Appellant, in Case No. 113 of the October, 1925 Term, entitled *North German Lloyd* vs. *United States.*)

Respectfully submitted,

WILLIAM B. DEVOE,
Attorney for Appellant.

15 Park Row,
New York,
October 10, 1925.

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Supreme Court of the United States

OCTOBER TERM, 1924

No. 489 [illegible] 957.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

WILLIAM B. DEVOE,
Attorney for Appellant.

PRINTED IN THE UNITED STATES BY B. H. TYRREL, PRINTER, 206 FULTON STREET, NEW YORK.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 489

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

Foreword.

The appellant in the case at bar and the appellant in the case of *North German Lloyd* vs. *United States*, now pending on appeal in this Court, filed a joint brief in the Court below, in which the two cases were heard together. For this reason certain paragraphs of this brief may be found to be identical with paragraphs of the brief filed by the North German Lloyd in this Court.

OPINION OF COURT BELOW.

The decision of the Court of Claims was embodied in a memorandum accompanying the judgment entered March 17, 1924, dismissing claimant's petition and sustaining defendant's demurrer thereto (R. 6). In this memorandum the Court stated that it had no jurisdiction for the reasons given in its opinion in the case

of *Deutsch-Australische Dampfschiffs-Gesellschaft* vs. *United States*, decided simultaneously with the present case (R. 6). Neither this opinion nor the memorandum have been officially reported, but they are set forth at pages 6 to 13 of the Record herein.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment to be reviewed was entered March 17, 1924 (R. 6). The action of the Court below in dismissing the petition of the appellant (claimant below), sustaining defendant's demurrer thereto and ruling that it had no jurisdiction (R. 6) are relied on as the basis of this Court's jurisdiction. This jurisdiction is invoked pursuant to Sections 242 and 243 of the Judicial Code as the same existed prior to the changes effected by the Act of Congress of February 13, 1925. An appeal to this Court was applied for on June 10, 1924 (R. 13) and allowed by the Court of Claims on June 16, 1924 (R. 14). The record on appeal was filed on June 27th, 1924 (R. 14). The appeal was therefore pending in this Court when the Act of February 13, 1925, went into effect, and by Section 14 of that Act appellant's right to invoke the jurisdiction of this Court was not affected by said Act. Numerous cases might be referred to sustaining such jurisdiction, as it existed prior to the Act of February 13, 1925, to hear cases like the one at bar. One of the most recent and typical of these is the case of *A. W. Duckett & Company* vs. *United States*, 45 Supreme Court Reporter 38. In that case the Court of Claims dismissed claimant's petition for want of jurisdiction, on the ground that no contract could be implied on the part of the United States to compensate claimant (58 Court Claims, 234, 403). An appeal to this Court was sought and allowed, and this Court reversed the judgment, with directions to the Court of Claims to award proper com-

pensation to the appellant. That case is thus closely analogous to the case at bar, and involves the same mode of procedure resorted to here.

STATEMENT OF THE CASE.

This action was brought in the Court of Claims by the appellant (claimant below) to recover from the United States the sum of $98,613,780, being the aggregate value of thirty merchant vessels belonging to appellant, title to which was taken by the United States on various dates in May, June and July, 1917. The action was commenced by the filing of appellant's petition on April 5, 1923 (R. 1). Besides listing the vessels and their respective values this petition alleges substantially as follows:

1. That appellant is a German corporation, and for many years up to and including July, 1914, operated steamship services in various parts of the world (R. 1).

2. That in August, 1914, these services were discontinued because of the outbreak of the European War, and certain merchant vessels belonging to appellant thereupon remained in various ports of the United States and its possessions, which they had entered in the ordinary course of commercial voyages, as ports of refuge to avoid the risk of capture; and in like manner certain other merchant vessels belonging to appellant shortly thereafter entered into and remained in such ports (R. I, 2).

3. That all of said vessels still remained in said ports as ports of refuge on April 6, 1917, when war was declared by the United States against Germany, and on that day were entered upon and taken possession of by the United States (R. 2).

4. That on May 12, 1917, a Joint Resolution was adopted by Congress and approved by the President, the title and body of which were as follows:

"Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessels in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy, be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascer-

tain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings, to the Secretary of the Navy, who shall preserve such report with the records of the department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation." (R. 2, 3).

5. That on various specified dates in May, June and July, 1917, title to all of appellant's said vessels (which are enumerated) was or purported to be taken over by the United States, by virtue of executive orders made by the President under the authority of said Joint Resolution (R. 3, 4).

6. That no compensation has been paid or awarded to appellant (R. 4); that no action has been taken on the claim in Congress nor any request made for such action (R. 5); that appellant is sole owner of the claim, has made no assignment thereof, is justly entitled to the amount claimed, and has not aided or abetted rebellion against the United States (R. 5); that Germany accords to American citizens reciprocal rights to sue in her courts (R. 1).

7. The petition asserts that appellant's claim is founded on the Constitution, the Joint Resolution of May 12, 1917, above referred to, an implied contract with the Government to pay compensation and a claim not sounding in tort for unliquidated damages for the reasonable value of appellant's vessels (R. 4, 5).

On May 26, 1923, the Government demurred to appellant's petition on the ground that it did not state a cause of action against the United States (R. 6).

On February 18, 19 and 20, 1924, the demurrers in this case and several other cases involving the same

questions were argued and submitted (R. 6), and on March 17, 1924, the Court of Claims rendered judgment sustaining said demurrer and dismissing appellant's petition (R. 6). In an accompanying memorandum that Court stated that it had not jurisdiction, for the reasons set forth in an opinion rendered on the same date in the case of *Deutsch-Australische Dampfschiffs-Gesellschaft* vs. *U. S.* (R. 6). This opinion is printed in full on pages 6 to 13 of the record herein.

Carl L. Schurz, theretofore attorney for the appellant, died May 19, 1924. On June 7, 1924, William B. Devoe, appellant's present attorney, was on motion substituted for Mr. Schurz as appellant's attorney of record (R. 13).

An appeal from the judgment of the Court below was applied for on June 10, 1924 (R. 13) and the appeal was allowed on June 16, 1924 (R. 14). The printed record was filed in this Court on June 27, 1924 (R. 14).

SPECIFICATION OF ERRORS.

1. The Court below erred in dismissing appellant's petition and sustaining the demurrer of the Government thereto.

2. The Court below erred in deciding that appellant's petition did not state a cause of action against the United States.

3. The Court below erred in deciding that it had not jurisdiction in the case at bar.

ARGUMENT.

I.

THE COURT BELOW ERRED IN HOLDING THAT APPELLANT'S PETITION HEREIN DID NOT STATE A CAUSE OF ACTION AGAINST THE UNITED STATES.

To sustain this proposition it will be shown that although Congress could have confiscated appellant's ships, yet it did not do so. In support of this contention it will be pointed out that the mere taking of private property for public uses under the war powers of Congress does not in itself import a confiscation of such property; that confiscation of enemy property is contrary to the traditional policy of the United States and to modern conceptions of international law, and will therefore never be presumed unless an intent to confiscate is expressly indicated; that the Joint Resolution of May 12, 1917, under which appellant's ships were taken, gives no indication of an intent to confiscate them, but every circumstance connected with that Resolution and every inference which can fairly be drawn from it indicates an intent *not* to confiscate.

It will next be shown that if appellant's ships were not confiscated they must have been taken by an exercise of the power of eminent domain, because there is no other method by which the Government can take private property for a public use; and if the ships were taken by virtue of that power, then appellant is entitled under the Constitution to receive compensation for them, and is not deprived of that Constitutional protection because it was an alien enemy corporation at the time of the taking.

A. It is not the power of Congress to confiscate appellant's ships but the fact that there was confiscation, which is disputed by appellant.

It may be conceded at the outset that one of the inherent rights possessed by every sovereign government is the right to confiscate the property of enemies in time of war, and that this right may be exercised by Congress as one of the war powers conferred upon it by the Constitution. The right was declared to exist by this Court as long ago as 1796, in the case of *Ware* vs. *Hylton*, 3 Dallas 199. The exercise of this right has since then frequently been reprobated on grounds of justice and morality, both by this Court and others and it has fallen into complete disuse as will be shown in a subsequent part of this brief. Nevertheless the naked right still exists, and could not be challenged on strictly legal grounds.

It is, however, equally well established that this power can, under our form of government, only be exercised by Congress, and that a declaration of war does not of its own force bring the power into play. Authority for these propositions is found in the case of *Brown* vs. *United States*, 8 Cranch 110, decided by this Court in 1814. It is the purpose of this brief to show that in the present instance there is nothing to indicate that a confiscation of appellant's ships was intended or effected by Congress, but that on the contrary every circumstance indicates an intent *not* to confiscate them.

B. The public policy of the United States, since its earliest days, has been opposed to confiscation of enemy property, and an intent to confiscate can therefore never be presumed but must be expressly indicated.

The mere taking of private property by Congress under its war powers does not, of course, import a confiscation of the property thus taken. During the recent war more than seventeen different enactments were

passed by Congress pursuant to these powers, in which various references were made to compensating the owners of the property seized, but in no instance except the case at bar has it been suggested that a confiscation was intended. (These legislative enactments are enumerated in a foot-note in 256 U. S. on page 553). In determining whether such was the actual intent of Congress, it is pertinent to consider that the public policy of the United States, since its earliest days, has been opposed to the confiscation of enemy property.

During the Revolution the Continental Congress did not enact any confiscatory measures. The Treaty of Peace between the United States and Great Britain, of September 3, 1783 (Treaties and Conventions Between the United States and Other Powers, Government Printing Office, 1889, p. 375), provided that Congress should recommend to the Legislatures of the several States to provide for the restitution of all property rights of British subjects that had been confiscated. Some years later the United States concluded the Jay Treaty with England, and the treatment of enemy property became the subject of widespread public discussion. In this Alexander Hamilton was the leading protagonist of the view that enemy property should not be made the subject of confiscation. Hamilton's services as a member of the Convention which framed the Constitution, as the man who did more than any other to procure its ratification by the States, as Secretary of the Treasury and leading member of the Cabinet in the administration of Washington as President, entitle his views upon any question of policy to as weighty consideration as those of any man whom our country has produced. Hamilton wrote his "Camillus Letters" about 1795, principally for the purpose of persuading the country to adopt, for that time and the future, the policy of extending protection to the property of aliens found within our borders if by the accident of

circumstances our Government and theirs should come to be at war. We quote from the "Camillus Letters" as follows:

"XVIII. No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation.

"It would have been an inestimable gem, in our National Constitution, had it contained a positive prohibition against such a practice, except, perhaps, by way of reprisal, for the identical injury on the part of another nation.

"There is, indeed, ground to assert, that the contrary principle would be repugnant to that article of our Constitution which provides, that 'no State shall pass any law impairing the obligation of contracts.' The spirit of this clause, though the letter of it be restricted to the States individually, must, on fair construction, be considered as a rule of the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war. But it is a pity that so important a principle should not have received an express and direct sanction.

"XIX. The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.

"There is no parity between the case of the persons and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property, which, during peace, serves to augment the resources and nourish the prosperity of a state?

"The property of a foreigner placed in another country, by permission of its laws, may justly be

> regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?"

The country's early jurists were also outspoken against the policy of confiscation.

In *Brown* v. *U. S.*, 8 Cranch, 110, 3 L. Ed. 504, Chief Justice Marshall, while admitting that the sovereign (that is to say, in our country, the Congress) had the power to pass confiscatory measures, did not refrain from condemning the exercise of the power. Concerning it he says (p. 128 of 8 Cranch, p. 510 of 3 L. Ed.):

> "• • • The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although *it cannot be disregarded by him without obloquy,* yet it may be disregarded" • • • (Italics ours.)

In the same case Justice Story wrote a dissenting opinion, but on the point in question, of the evil policy of confiscating enemy property, he was in agreement with the majority of the Court. Referring to the "Camillus Letters," Nos. 18 to 23, Judge Story says (p. 141 of 8 Cranch, p. 515 of 3 L. Ed.):

> "• • • I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, *but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable.* He proves incontrovertibly what the highest interest of nations dictates with

a view to permanent policy; but I have not been able to perceive the proofs by which he overthrows the ancient principle," (that is, that enemy property was formerly subject to confiscation).

He further says (p. 145 of 8 Cranch, p. 516 of 3 L. Ed.):

"* * * I am not bold enough to interpose a limitation where Congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. *This, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced that nothing but an express act of Congress would satisfy my mind that it ought to be included among the fair objects of warfare* * * *" (Italics ours.)

(N. B.: The majority opinion held that *Congress alone, not the President,* has the power in any case.)

Many of the old cases, and also the textwriters on international law, speak of debts and credits of enemies. This seems to be because these were the forms of enemy property most frequently found within a country. Chief Justice Marshall asserts that there is no distinction in reason between debts and credits and other forms of property. In the *Brown Case, supra,* at p. 123 of 8 Cranch, p. 509 of 3 L. Ed., he says:

"Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction."

Brown v. *U. S.* was decided in 1814. The case of *U. S.* v. *Percheman* came before the court in 1833 and again the majority opinion is written by Marshall, and in it he says, concerning the results upon private property of the transfer of dominion:

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. *The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.* (Italics ours.) (*U. S.* v. *Percheman*, 7 Peters 51, at foot of p. 86; 8 L. Ed. 604, at p. 617.)

In 1846 Congress, in declaring the existence of a state of war with Mexico, (9 Stats. at Large, p. 9) omitted any specific reference to the treatment of enemy property, and a United States District Court, following the *Brown case* (*supra*) refused to condemn an enemy vessel found in an American port, holding that such private property was under the protection of American law (*The Juanita*, Newberry, p. 352).

Of course it is not contended, in view of the difference in facts between the cases, that any of the cases just cited constitute strict legal precedent in the instant case. All that is contended is that these cases prove that the *policy* of the United States is so opposed to confiscation that he who claims that confiscation is intended in a given case is put upon proof to support his claim.

In further support of this contention it may be pointed out that the only acts of Congress which have been held to be confiscatory of enemy property were Acts

which declared in their title the purpose of confiscation and in their body provided for carrying this purpose into effect. These were the so-called Civil War Confiscation Acts. These are the Acts of August 6, 1861 (12 Stat. at L., p. 319) and July 17, 1862 (12 Stat. at L., p. 589).

These will be noticed more at length hereafter. For the present they are referred to only for the purpose of pointing out that the argument that the Joint Resolution of May 12, 1917, here in question, is not a confiscatory measure, is strengthened by the fact that Congress, at a time when it desired to enact a confiscatory law, did enact it in terms as plain and certain as those employed in the Act of July 17, 1862. We submit that it is a notable circumstance that on the one occasion when our Government departed from its policy of declining to confiscate the property of enemies, it expressed its departure from that policy in the plainest possible terms.

The greatest contemporary American authority on International Law is Mr. John Bassett Moore, who was for many years and until recently the adviser of the State Department on such matters. At p. 308 of Vol. 7 of his Digest of International Law, Mr. Moore, after reviewing numerous authorities, says:

> "Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> " 'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, *may be said to enjoy a practical immunity from confiscation.*' "

As further proof that the Civil War Confiscation Acts are mere exceptions to a general rule and that the ancient American policy of non-confiscation remains the policy of our Government at the present day, we quote

the following extract from the speech delivered by Charles E. Hughes, then Secretary of State, at Philadelphia on November 30, 1923. Referring to Latin America, he said:

> "States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws.
>
> "A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful co-operation is possible.
>
> "Each State may have its code of laws in accordance with its conception of domestic policy, *but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles.*" (Italics ours.)

In the concluding paragraph the Secretary of State only repeats in other words the thought expressed by Hamilton when ("Camillus Letters" XVIII) he denounced

> "The idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation."

And when ("Camillus Letters" XIX) he asserted that:

> "Whenever, therefore, a Government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security."

The Government, when prosecuting the case of *U. S.* vs. *Chemical Foundation* (294 Fed. Rep. 300) held the opinion here expressed that confiscation of enemy property is contrary to the policy of the United States. From the brief of the Attorney-General filed in that case in the U. S. District Court we quote as follows:

> "* * * Confiscations of the private property of the enemy have met the universal disapprobation of the civilized world for nearly two hundred year." (p. 156.)
>
> "9. It is to be presumed that Congress, by the amendment of March 28 (to the Trading with the Enemey Act), did not intend to violate the 'law of nations' by authorizing confiscation of enemy property, unless the act clearly so directs." (p. 196.)
>
> "That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized." (p. 198.)
>
> "With the growth of Christianity, the practice of enslaving the defeated enemy gradually disappeared, but the practice of seizing his property continued. It early developed that the seizure must inure to the benefit, not of the individual members of the victorious army, but to the sovereign power of the nation. Then with the growth of commercial intercourse and with the

progress of civilization, the idea that both the person and the property of the individual enemy was free from confiscation, although both might be arrested or impounded as a measure of safety during the war developed." (p. 202.)

"* * * The policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the military zone in time of war." (p. 574.)

Although the references in the brief just quoted are to property *on land*, the modern tendency among civilized nations is to accord the same treatment to enemy ships tied up in the ports of a country on the outbreak of hostilities. This attitude is reflected in Articles 1 and 2 of the Sixth Hague Convention (1907), which read as follows:

"Article 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

"Article 2. A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, can not be confiscated.

"The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war or requisition it on payment of compensation."

It may be said that the reference to the Hague Conventions is not to the point because the American delegation did not sign this particular one. *The refusal to sign, however, was based upon their view that the articles in question did not go far enough to express what had already become an absolutely binding obligation so far as the United States was concerned.* The report of the American delegation on this point is printed in full in Foreign Relations, 1907, at p. 1158.

And, as the practice of governments serves to illustrate the conceptions of law which they hold, it may be useful to observe that neither at the outbreak of the war between the States nor at the outbreak of the Spanish War was any impediment offered to ships owned and registered in the Confederate States in the one case, or in Spain in the other, freely departing.

C. The joint resolution of May 12, 1917, gives no evidence of an intent to confiscate the enemy property referred to therein, but on the contrary clearly indicates a lack of such intent, as appears from the following:

1. The term "confiscation" or its equivalent is not used in the Joint Resolution.

This fact is of great weight when it is recalled that Congress, if it had desired to enact a confiscatory measure, had before it a precedent in the Act of July 17, 1862 (12 Stat. at L., p. 589), entitled "An Act to suppress insurrection, to punish treason and rebellion, to *seize and confiscate* the property of rebels, and for other purposes," which act had been held constitutional by a

majority of the Supreme Court. *Miller* vs. *U. S.*, 11 Wall. 268.

As pointed out above, it is not permissible to *presume* an intention to confiscate. We respectfully submit that with the Civil War precedent before it, if Congress had *intended* a confiscation of this ship property it would not have failed to use the word "confiscate," or a word expressive of that meaning, in either the title or the body of the Joint Resolution.

2. The language of the Resolution is merely permissive and not mandatory.

The manifest purpose of the act was to provide the United States with facilities if needed, by enabling the Government (a) to acquire "immediate possession and title" of any vessel affected by the Joint Resolution, and (b) to "operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise." (So far as coastwise service is concerned, the Resolution was a necessary enabling measure. Without it these ships, being foreign-built, could not have been operated coastwise. See Act of August 18, 1914, c. 256, sec. 1, 38 Stat. 698.) The President is not *directed* or *required* to take title. He is simply *authorized* to do so. So, also, he is simply *authorized*, not directed or required, to put the ships into service. If in the exercise of his own judgment he had refrained from taking title, or, after taking title had refrained from putting the ships into service, it could not be said that he had violated any mandate imposed upon him by Congress; so likewise if he had taken some ships and refrained from taking others (as a matter of fact the records show that he took some at one time and others not until a later date).

In all this it is apparent that the acquisition of facilities was the purpose in view, and that there was no

thought of injuring, coercing or punishing any person or interest, for had such an intention been present the authority given to the President would have been mandatory and not merely permissive.

3. The Resolution authorizes the seizure of others besides enemy-owned ships.

The powers granted by the Resolution are so broad as to apply not only to ships then enemy owned (*i. e.*, German owned—we were not yet at war with any other nation), but to ships then owned by the nationals of friendly neutrals, of governments associated with us in the war, and even by American citizens themselves. The condition which subjected a ship to expropriation under the Resolution related to her ownership, flag or registry at the time she came into our jurisdiction (*i. e.*, with regard to appellant's ships, July-August, 1914). German ownership *at that time of the smallest share or fractional interest* subjected the whole ship in 1917 to the exercise of the powers granted the President by the Resolution, regardless of where the ownership might lie in 1917. The same is true as to flag or documentation, regardless of ownership. If these were German in 1914 the ship was subject to expropriation in 1917, regardless of changes in flag or documents in the interim.

By way of showing the broad scope of applicability of this Joint Resolution we refer to certain illustrative instances. German ships coming here in 1914 were purchased by Americans in 1915 under authority of an act of Congress of August 18, 1914 (c. 256, sec. 1; 38 Stat. at L. 698), and put under American registry and sent out as merchant ships. (See Life and Letters of Walter H. Page, by Burton J. Hendrick, published by Doubleday, Page & Co., 1922, vol. 1, pp. 392-394, referring to the "Dacia.") Such vessels as the "Dacia," had she not

been captured as prize, as she was by the French before we entered the war, would have been subject to expropriation under the Resolution. In another case now before this Court there are involved three vessels taken under the terms of this Joint Resolution, although they had been American owned and under American registry and flag since 1913 (*Atlas Line S. S. Co.* v. *U. S.*, case No. 477, October Term, 1924).

The Austrian steamer "Martha Washington" was requisitioned on August 31, 1917, although no state of war then existed between the United States and Austria. Later (May 11, 1918) title was taken under the Resolution. The United States afterwards paid compensation for her use down to the date of taking title, although, for a part of the use period (*i. e.*, December 7, 1917—May 11, 1918) we were actually at war with Austria. See Record of Hearings before House Committee on Merchant Marine, 66th Congress, 3d Session, December 15, 1920, re bill H. R. 14985. See also Minutes of U. S. Shipping Board of April 16, 1920, for Resolution re Compensation for S. S. "Martha Washington," which is of such importance that we quote it in full as follows: (Italics ours.)

> "WHEREAS, On August 31, 1917, the United States Shipping Board requisitioned the vessel MARTHA WASHINGTON, a passenger steamship of 8312 tonnage, then owned by Cosulich Societa Triestina di Navigazione, a corporation organized in Trieste, Province of Litorale, Austria; and
>
> "WHEREAS, At the time of said requisition, the MARTHA WASHINGTON *had Austrian registry and flew the Austrian flag,* and was lying at the port of New York; and
>
> "WHEREAS, The said Cosulich Societa Triestina di Navigazione claims to be in fact an Italian Corporation, and seeks to have the said MARTHA

WASHINGTON reconveyed and recover compensation for its use while under the jurisdiction of the United States; therefore be it

"Resolved, That at the time the MARTHA WASHINGTON was requisitioned said vessel had the status of a *neutral vessel subject to requisition* by the United States Shipping Board under the power delegated to said Board by the President of the United States, which authority was vested in the President by an act of Congress, the Board has no authority to reconvey the said vessel to the Cosulich Societa Triestina di Navigazione, regardless of whether or not said corporation may at the present time be entirely Italian in character and purpose; and be it

"Further resolved, That the *claimants be remitted to the State Department to establish their Italian citizenship* as a prerequisite to the delivery of the vessel and compensation therefor after May 11, 1918; and be it

"Further resolved, That the recommendations of the Requisition Claims Committee that the award of compensation for the use of said vessel during the period it was in use under the Requisition Order of August 31, 1917—from August 31, 1917, to December 7, 1917, be fixed at $219,436.80, from which should be deducted the cost of repairs effected by the United States Navy, and the time required to make same, and further, that *just compensation for the use of said vessel from December 7, 1917, until the United States took over possession and title of said vessel on May 11, 1918, in accordance with Executive Order No. 2859-A be fixed at $352,013.20,* be, and they are hereby approved; and be it

"*Further resolved*, That the Disbursing Officer of the United States Shipping Board be, and he is hereby authorized *to pay the amount awarded to the claimant* upon securing the consent of the Alien Property Custodian thereto; and be it

"*Further resolved*, That pending receipt of information from the Navy Department with respect to the cost of the repairs and the time required to effect the same, the claimant be required to guarantee the payment thereof; and that the State Department be advised of this guarantee in order that it may be enforced before redelivery of the MARTHA WASHINGTON is effected, in the event the claimant establishes his right thereto."

We refer to this situation at such length for the support it lends to the following observations:

(a) The fact that the Resolution authorized the United States to take title to neutral, allied and American-owned and registered vessels, no less than German-owned vessels, leads inevitably to the conclusion that it was intended that such vessels should be paid for. It is impossible to hold that Congress intended to authorize the taking of the ships of a neutral, an ally or a citizen without compensation. It is equally impossible for the court to apply one rule to the ships of such persons and another rule to enemy ships. To make such a distinction would lie only in the power of Congress, and Congress has laid down one rule for all.

(b) The Executive Department of the Government has recognized that no distinction was made between enemy and non-enemy ships, in paying the sum of $352,000 for the use of the Austrian ship, "Martha Washington," from the date of the declaration of war with Austria on December 7, 1917, to the

date when title to the ship was taken on May 11, 1918. (See Shipping Board Resolution, *supra*.)

(c) Recognition of the right of the owners of the "Martha Washington" to be paid compensation for her use during that part of the period of the war with Austria that preceded the taking of title, constitutes an admission of their right to recover compensation for the property of which they were deprived when *title* was taken. Reason and justice do not justify taking a *title* without compensation, when the right to be compensated for *use* prior to the taking of title is recognized. Of course, also, if Austrian enemies are entitled to be compensated, German enemies are equally entitled. No ground exists for distinguishing between the two, and if power to make an arbitrary distinction may be claimed to exist anywhere, it could be only in Congress, which has not attempted any distinction.

One feature of the Martha Washington case deserves special mention. It was admitted that the ship was of Austrian flag and registry, that the corporation owning her was an Austrian corporation and that its managing directors and majority stockholders were Austrian subjects. It was asserted, however, that the corporation was organized and controlled "by those who were of Italian blood and Italian sympathy, although underlying that they were subject to the domination of Austria until this portion of Italia Irredenta was redeemed" (Report of House hearing, *supra*, especially page 5; Shipping Board Resolution, *supra*). The Shipping Board resolution shows that this claim was treated as immaterial in the making of the award for compensation. The Resolution orders: "that the claimants be remitted to the State Department to establish their Italian citizenship as a prerequisite to the de-

livery of the vessel and compensation therefor after May 11, 1918" (*i. e.*, after date of taking title). And, entirely disregarding this claim and dealing with the steamer as an Austrian vessel, the Board found: "that just compensation for the use of said vessel from December 7, 1917, until the United States took over possession and title of said vessel on May 11, 1918, in accordance with Executive Order No. 2859-A be fixed at $352,013.20 * * *." That is to say, the Board awarded compensation for the use of the vessel during that part of the Austrian war period which preceded the taking of title, although conceding that she was an Austrian—hence, enemy-owned ship.

(No distinction exists between a "requisition" and a "condemnation." Judge Smith in the U. S. District Court for the Eastern District of South Carolina in *Filbin Corporation* v. *United States*, 266 Fed. Rep. 913, referring to the language of the Fifth Amendment said:

> "Nothing is said about 'requisition' or 'condemnation'; the word used is 'taken.' The result of either condemnation or requisition is *a taking*, and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation; and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of the public and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation.")

4. Claims for compensation are contemplated by the language of the Resolution.

Section 2 of the Joint Resolution reads as follows:

> "Sec. 2. That the Secretary of the Navy be, and he is hereby authorized, and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

A "claim," in a judicial sense, has been defined by this Court to be "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty". (*Prigg* vs. *Penna.*, 16 Peters 539, 615). The plural word "proceedings" is defined by Webster (New International Dictionary, Merriam 1918) as "a. The course of procedure in an action at law; b. Any step or act taken in conducting litigation".

It must be assumed that Congress, in framing legislation, chooses words advisedly and with a due sense of their values and their aptness to express the legislative purpose. The use of the terms "proceedings" and "claim" show conclusively that Congress contemplated that demands for compensation would be asserted *as a matter of right* by appropriate judicial proceedings. Moreover, how absurd it would have been to provide that the appraisal referred to in the Resolution should be

competent evidence in certain proceedings, if those proceedings were not themselves to be permitted.

5. Statements made by Members of Congress and public officials indicate a belief that the Joint Resolution did not intend the confiscation of enemy ships.

When the utterances of members of Congress in regard to a pending measure indicate conflicting views as to its meaning and intent, such utterances do not afford a satisfactory guide to its interpretation (*United States* vs. *Trans-Missouri Freight Ass'n.*, 166 U. S. 390); but when the debates in Congress show a unanimity of opinion in the views expressed by its members, there is suggestive strength in that fact (*Banco Mexicano* vs. *Deutsche Bank*, 263 U. S. 591, 602); and the records of Congress, as well as the history of an enactment and the situation which existed at the time of its passage, will be considered by this Court in determining its true meaning (*Holy Trinity Church* vs. *U. S.*, 143 U. S. 457, 463; *Blake* vs. *National Banks*, 23 Wallace 307; *Buttfield* vs. *Stranahan*, 192 U. S. 470, 495; *Texas & Pac. R'y. Co.* vs. *Interstate Commerce Comm.*, 162 U. S. 197).

In the case at bar, every member of the House of Representatives who spoke in the debates on the Joint Resolution of May 12, 1917, indicated a belief that compensation for the seized ships was contemplated by that measure. Among the more significant of these utterances were the following:

Mr. Rowe of New York, speaking of the seizures authorized by the Joint Resolution, said (Cong. Rec. May 7, 1917, p. 1919):

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take real estate in my State and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted

immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.

"There is no man in this House to-day that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will be paid. We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government *before this war is closed."*

Mr. Stafford of Wisconsin said (*Ibid,* p. 1919):

"I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships; but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships."

Mr. Stafford also said (*Ibid,* p. 1919):

"That principle is akin to that providing compensation for these interned ships; that being interned here, the owners not having the privilege of leaving port except by rushing into the jaws of destruction, are entitled to have their rights conserved and recognized in the courts of this country. And I make this claim, that if Germany accords to our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accords them reciprocal rights, then these foreign subjects, upon the seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property."

Mr. Bankhead of Alabama interrupted Mr. Stafford (*Ibid*, p. 1920) to ask whether the Joint Resolution involved a denial of the principle that compensation should be paid. Mr. Stafford replied (*Ibid*, p. 1920):

> "The bill provides, in section 2, for the means whereby the Secretary of the Navy may appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas remarked (*Ibid*, p. 1921):

> "This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen, and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

Mr. Small of North Carolina said (*Ibid*, p. 1922):

> "I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time."

Mr. Edmonds of Pennsylvania remarked (*Ibid*, p. 1923):

> "We take the ships. We have arranged to leave the question of compensation open. The

> treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in the Courts of Claims, where they have a right to take it."
>
> * * * * *
>
> "I think we can afford to pass this resolution and leave it to the court to pass upon in due time what we are to pay for these ships."

Mr. Hadley of Washington, speaking of the appraisal provided for by Sec. 2, said (*Ibid*, p. 1924):

> "It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution."

The entire debate is set forth on pages 1903 to 1932 of Vol. 55, Part 2 of the Congressional Record. A study of this debate shows that it gives full support to the following propositions:

(a) That Congress *intended* that the ship owners affected by the Joint Resolution, enemy no less than neutral, should be compensated for their seized ships.

(b) That the opinion was held, with practical unanimity, that the Resolution as passed gave rise to an absolute right to compensation.

(c) That such differences of opinion as existed had reference only to the questions of the time of payment and of the manner in which the compensation ultimately to be paid should be determined, and the tribunal for establishing the proper amount.

(d) That a respectable body of opinion among the Legislators—of course it is impossible to determine whether or not a majority—clearly believed that the Joint Resolution, without anything more, was suf-

ficient in itself to give the Court of Claims jurisdiction to determine the amount.

The belief that the Joint Resolution contemplated the payment of compensation was not confined to members of Congress. The State Department, over the signature of Van S. Merle-Smith, and under date of December 8, 1920, addressed to Senator Lodge, Chairman of the Foreign Relations Committee of the Senate, a letter relating to the Austrian steamship "Martha Washington." This letter was used by the Hon. Charles E. Hughes, afterward Secretary of State, in his argument addressed to the House Committee on the Merchant Marine and Fisheries, 66th Congress, 3d Session, December 15, 1920, and is printed in full in the record of said hearing. In this letter Mr. Merle-Smith said:

> "The joint resolution of May 12, 1917, which authorized the seizure of the vessel, contemplates the payment of compensation."

The record of the above-mentioned hearing also contains on p. 17 the following colloquy between Mr. Hardy of Texas, a member of the Committee, and Mr. Hughes.

> "Mr. Hardy— * * * As I understand it, under international law, the private property, and justly so, of a private citizen of a country which may get into war with us, is really sacred.
>
> "Mr. Hughes—And ought to be."

D. If the taking of appellant's ships did not constitute a confiscation of them, they must have been taken by an exercise of the sovereign right of eminent domain, and appellant is entitled to compensation.

When a sovereign power seizes private property within its jurisdiction, it must either confiscate such property or take it by virtue of the right of eminent

domain possessed by every sovereignty—that is, the right to take the ownership and possession of private property for a public use. There is no third alternative method—no vague, indefinite kind of taking by which a Government can acquire the title to private property.

The right of eminent domain attaches to every species of property within the territorial jurisdiction of a sovereign Government (20 Corp. Jur. 587). It applies to the property of aliens as well as to that of citizens, for no alien is granted a greater or more favorable tenure of property than is permitted to citizens. In time of peace the Government of the United States could have exercised this power with respect to appellant's property; and certainly the outbreak of war did not lessen its rights with regard to such property.

It is believed that the preceding parts of this brief have established the proposition that the Government of the United States did not confiscate, nor intend to confiscate, appellant's ships. It must follow that they were taken by an exercise of the right of eminent domain; and the exercise of that right carries with it the obligation to make compensation for the property so taken.

Few legal propositions are more firmly established than this one. In the case of *Langford* vs. *United States*, 101 U. S. 341, this Court declared:

> "We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind the Government, takes for public use, as for an arsenal, custom-house or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value."

and,

> "This right to compensation follows from the two propositions, that it was private property and

was taken for public use, neither of which is disputed."

In the case just cited the plaintiff sued in the Court of Claims to recover for the use and occupation of lands and buildings to which both the plaintiff and the United States claimed title. Both the Court of Claims and this Court decided against the plaintiff solely on the ground that the Government claimed that it was dealing with its own property, and recognized no title superior to its own; holding that if in such a case it is made to appear that actual title is in the plaintiff the acts of the agents of the United States in holding possession are mere torts.

The doctrine stated by the Court in the *Langford Case*, that if the United States takes property without a claim of title, the owner thereby becomes entitled to compensation, is recognized and expressly applied in the case of *U. S.* v. *Lynah*, 188 U. S. 445, 47 Law Ed. 539. In that case, the claim being for only $10,000.00, the matter was within the jurisdiction of the Circuit Court and suit was brought in the Circuit Court for the District of South Carolina, based on an implied contract for compensation for the value of property taken by the United States for public use. The facts were that the United States, in making improvements to the channel of the Savannah River, built dams that caused valuable rice lands of the plaintiff to be flooded, so as to render them impossible of cultivation and destroy their value. The case was tried by the Court without a jury and the Court found the facts to be as before stated and thereupon gave judgment for the plaintiffs for $10,000.00. The United States carried the judgment to this Court for review on writ of error.

Mr. Justice Brewer, writing the majority opinion, stated that three principal questions were involved in the case. First, did the Circuit Court have jurisdiction?

second, was there a taking of the land within the meaning of the Fifth Amendment? and, third, if there was a taking, was the Government subject to the obligation of making compensation therefor? Each of these questions was decided in the affirmative. For present purposes we are concerned only with the decision of the third question.

Upon this third question the Court said (at p. 471 of 188 U. S., p. 549 of 47 Law Ed.):

> "But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

And, earlier in the opinion, after having discussed numerous preceding cases, the Court speaks as follows (p. 465 of 188 U. S., p. 546 of 47 Law Ed.):

> "The Government may take real estate for a postoffice, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

While three judges dissented from the majority opinion, their dissent is based upon the view that, as a *matter of fact*, the property had not been taken, because by means of embankments and pumps the flowing of the

lands could have been prevented. Of course, dissent on such grounds does not imply that the dissenting judges took exception to the legal principle laid down by the Court, that where a taking actually occurs the right to compensation follows.

One of the preceding cases on which the Court based its decision in the *Lynah Case* was that of *U. S.* v. *Great Falls Manufacturing Co.* (1884), 112 U. S. 645; 28 Law. Ed. 846. In the *Great Falls Case,* the plaintiff sued and recovered judgment in the Court of Claims for the past and future use and occupation by the United States of certain lands owned by the company and taken possession of by the United States in the execution of a plan for supplying the City of Washington with water. The United States did not assert any title to the lands claimed by plaintiff. The lands in question were occupied by a dam, or its abutment, constructed pursuant to an act of Congress. The Government commenced, but later abandoned, proceedings to condemn the lands, and simply took and held possession of them without acquiring title. The Court distinguished this case from the *Langford Case* (*supra*) upon the ground that here the title of the plaintiff was not disputed. This Court affirmed the judgment of the Court of Claims in favor of the plaintiff, and in doing so said (foot of page 656 of 112 U. S., column one of page 850 of 28 Law Ed.):

> "* * * we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an im-

plication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

In *De Camara* v. *Brooke* (1905), 135 Fed. 384 (at page 390), Judge Holt, in the U. S. District Court for the Southern District of New York, citing the *Great Falls Manufacturing Co. Case* and the *Lynah Case,* makes the following observation concerning their effect:

> "It is well settled in this country that if the Government, in violation of the provisions of the Constitution, takes private property for a public use, without compensation, a cause of action arises against the Government upon an implied contract to pay for it."

In 1914 this Court reaffirmed the principle that when the Government takes property to which it asserts no title, the implied obligation arises to make compensation for it. In *U. S.* v. *Buffalo Pitts Co.,* 234 U. S. 228; 58 Law Ed. 1290, plaintiff, a manufacturer of machinery, sold an engine to a contractor on Government work and took a chattel mortgage to secure part of the purchase price. The contractor defaulted in the work and the Government took over the completion of the contract, taking possession of the engine as part of the machinery on the job. The plaintiff notified the representative of the United States of the existence of the chattel mortgage and that plaintiff claimed the property under the title vested in it by the chattel mortgage and claimed the right of possession because of the mortgagor's default.

The United States refused to surrender the engine to plaintiff and its agent reported to plaintiff that any legal proceedings to recover possession would be resisted, but that if the engine was left in the possession of the United States, its attorney would recommend that it be paid for. Thereupon plaintiff permitted the United States to retain possession, but, payment not having been made, brought suit to recover for the value of the engine. The claim being for less than $10,000.00, suit was brought in the District Court. The United States defended on the ground that the claim was based on tort and that there was no implied contract. Both the District Court and the Circuit Court of Appeals gave judgment in favor of the plaintiff and the United States appealed to the Supreme Court. This Court, as well as the courts below, found that as a matter of fact the United States did not assert ownership of the engine, although it did properly claim a right to take and use it. The Court quotes with approval from its former majority opinion in the *Lynah Case* as follows:

> "The rule deducible from these cases (*i. e.*, prior to the *Lynah Case*) is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

And reasserting the rule in its application to the case then before it says (at the foot of page 235 of 234 U. S., second column of page 1293 of 58 Law Ed.):

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use,

it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this Court, and arises because of the Constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States, guarantying the owner of property against its appropriation for a governmental use without compensation."

The principles enunciated by this Court in the decisions referred to above have recently been re-affirmed by it in two cases growing out of seizures of property during the recent war, which seem particularly applicable to the case at bar. These cases are

A. W. Duckett & Co. vs. *U. S.*, 45 Sup. Ct. Rep. 38

and

Campbell vs. *U. S.*, 45 Sup. Ct. Rep. 115.

In the *Duckett* case the President, pursuant to authority given him by the Act of Congress of Aug. 29, 1916, c. 418 (39 Stat. 619, 645) took possession through the Secretary of War of the Bush Terminal in Brooklyn, New York. The claimant, a lessee of one of the seized piers, was dispossessed and brought suit in the Court of Claims for the value of his leasehold, relying on a general order issued by the Secretary of War that steps would be taken to ascertain the fair compensation to be paid by the Government for the use of the premises. The petition was dismissed by the Court of Claims for want of jurisdiction, on the ground that no contract could be implied to pay for the value of a leasehold (58 Ct. Cls. 234, 403).

This Court reversed the decision of the Court of Claims, saying (p. 38):

"We can see no ground for attributing to the United States the extraordinary intent to recog-

> nize and pay for other interests but to exclude the claimant. The order made no such distinction but promised fair compensation, seemingly to all, and the subsequent appointment of a board of appraisers contemplated payment to tenants."

and on page 39:

> "Here the claimant's possession under its lease was a part of the res, and therefore was within the implied promise to pay. Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States *v.* North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

The facts in the *Campbell* case are set forth in the opinion of this Court as follows (p. 116):

> "In 1918 the United States, to aid in the prosecution of the war, had determined to build a nitrate plant at Ancor in the Little Miami valley, near Cincinnati, Ohio. In order to get a site, it had taken possession of many parcels of land making up a large tract, adjoining plaintiff's estate of 69.73 acres. August 31, 1918, an officer of the army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land."

The Government did not contest plaintiff's right to compensation, the only question in dispute being whether he was entitled to be compensated for a diminution in value of the remainder of his property caused by the

use to be made by the Government of other lands acquired for the same purpose. On this question this Court decided against plaintiff, but on the general principle to be applied in such cases used this significant language:

> "The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. Act June 3, 1916, c. 134, §124, 39 Stat. 215 (Comp. St. §3110b); Act July 2, 1917, c. 35, 40 Stat. 241, as amended April 11, 1918, c. 51, 40 Stat. 518 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §6911a). And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. United States *v.* Great Falls Mfg. Co., 112 U. S. 645, 656, 5 S. Ct. 306, 28 L. Ed. 846; United States *v.* Lynah, 188 U. S. 445, 464, 23 S. Ct. 349, 47 L. Ed. 539; United States *v.* Cress, 243 U. S. 316, 329, 37 S. Ct. 380, 61 L. Ed. 746; United States *v.* North American Co., 253 U. S. 330, 333, 40 S. Ct. 518, 64 L. Ed. 935. Thereupon he became entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken. Seaboard Air Line Railway Co. *v.* United States, 261 U. S. 299, 304, 43 S. Ct. 354, 67 L. Ed. 664."

E. The fact that appellant was an enemy alien did not deprive it of the constitutional right to compensation for its property taken for a public use.

The only ground on which the proposition stated above could conceivably be attacked is that the appellant

is a corporation created by a sovereignty with which the United States, at the time of the taking, was at war.

The right which the appellant asserts is derived from the Fifth Amendment, the applicable provisions of which read as follows:

> "Nor (shall any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In interpreting these provisions the courts have consistently held that the due process clause protects corporations in their property, notwithstanding that it is only a natural person who can be deprived of life or liberty. Concerning this clause, it is remarked at p. 413 of 11 Fed. Stats. Ann. that

> "A similar provision is found in nearly all of the State statutes; and everywhere, and at all times, and in all courts, it has been held either by tacit assertion or express adjudication, to extend, so far as their property is concerned, to corporations."

This quotation is taken from the opinion of Field, J., in *The Railroad Tax Cases*, 13 Fed. R. 722 at 746 (C. C., D. Cal., 1882), in which opinion the Court also states, after quoting the Fifth Amendment, as follows:

> "From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and therefore it might be said with much force that the word 'person,' there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person.

But such has not been the construction of the courts."

And in the following cases the Courts of the United States have held the due process clause to be applicable to the property of corporations:

San Mateo v. *Southern Pacific R. Co.*, 13 Fed. R. 145 (C. C., D. Cal. 1882) on page 151.

County of Santa Clara v. *Southern Pacific R. Co.*, 18 Fed. R. 385 (C. C., D. Cal. 1883) on page 404; affirmed on other grounds in 118 U. S. 394; 30 Law. Ed. 118.

Constantine J. Smyth, Attorney General et al., v. *Oliver Ames et al.*, 169 U. S. 466, at p. 522; 42 Law. Ed. 819, on page 840.

United States v. *McHie et al.*, 194 Fed. R. 894 (D. C., N. D. Illinois, E. D. 1912), on page 898.

So, also, the clause forbidding taking private property for public use without compensation has been held to extend to corporate owned property. In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 37 Law. Ed. 463, this Court held that the United States was required to pay for the value of a franchise to take tolls, granted to a corporation by a state, where the United States had condemned the physical property of the corporation for the improvement of the navigation of public navigable interstate waters, although the Act of Congress authorizing condemnation provided, "In estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated."

In the light of these authorities it cannot be maintained that the appellant is barred from the right to compensation merely because it is a corporation.

In like manner the due process clause has been held to apply to an *alien*, the specific application being that the Act of Congress of May 5, 1892 (27 Stat. at L. 25), authorizing the imprisonment for one year of a Chinese alien, for the offense of being unlawfully in the United States, was held to violate the due process clause by authorizing conviction before a commissioner, without trial by jury. *Wong Wing* v. *United States*, 163 U. S. 228, 41 Law. Ed. 140. In this case the Supreme Court, applying the principle of an earlier decision which turned upon the provision of the Fourteenth Amendment restraining the States from denying due process of law said (p. 238 of 163 U. S., p. 143 of 41 Law. Ed.):

> "The 14th Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws. Applying this reasoning to the 5th and 6th Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."

The only remaining ground for attacking appellant's right to compensation is that it was an *enemy* alien when

its property was taken. At first glance it may seem that the so-called "Confiscation Cases" growing out of the Civil War justify such an attack; but analysis will show that those cases did not involve the question here presented, and that their decisive force is apparent rather than real.

The Civil War brought forth two acts authorizing the confiscation of property. They are the Act of August 6, 1861 (12 Stat. at L. 319), and the Act of July 17, 1862 (12 Stat. at L. 589), as explained by the Joint Resolution of July 17, 1862 (12 Stat. at L. 627).

The Act of August 6, 1861, simply provided that property of any kind, used or employed or bought or sold with the intent to use or employ in aiding the Confederacy, should be

> "lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned."

Then followed provisions granting jurisdiction to the Circuit and District Courts of condemnation cases and provisions authorizing the United States attorneys to institute condemnation proceedings. The act was characterized by Judge Strong in *Miller* v. *U. S.* (*infra*) as follows:

> "It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet or promote the Rebellion, then a war, or to maintain the war against the Government."

The Act of 1862 was entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other pur-

poses." Its first four sections described the penalties for the crimes of treason and insurrection. It then provided that it should be the duty of the President to cause the seizure of all property belonging to officers of the Confederate army or navy, to officials and agents of the Confederate government, or to persons owning property in loyal states who might thereafter aid the rebellion. It next provided for the seizure of the property of all other persons within the United States then aiding the rebellion who should not, within sixty days thereafter, cease to do so. Finally the Act provided for proceedings *in rem* to secure the condemnation of property to which the Act related.

Coincident with the passage of the Act came the Joint Resolution of July 17, 1862, which as is well known, was passed in order to remove a doubt expressed by President Lincoln that, in the absence of such an interpretation, the principal act might be held unconstitutional. It reads as follows:

> "That the provisions of the third clause of the fifth section of 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' shall be so construed as not to apply to any act or acts done prior to the passage thereof; nor to include any member of a State legislature, or judge of any State court, who has not, in accepting or entering upon his office, taken an oath to support the constitution of the so-called 'Confederate States of America'; nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

The Act of 1861 extended only to property used or intended to be used to aid the enemy. The Act of 1862

was aimed at the property of those who had violated the allegiance which they owed to the United States. Unquestionably these Acts justified confiscation of enemies' property to the extent which they prescribed, and barred such enemies from the assertion of any rights which the Acts took away. The power of Congress to enact such legislation, then as now, is undisputed. But the fact that it was thought necessary to enact it and to interpret it by a Joint Resolution in order to avoid the suggestion of unconstitutionality, is of immense significance as indicating the belief that without such legislation enemies could not any more than citizens be deprived of their property without compensation.

Quite naturally, none of the cases growing out of the Confiscation Acts discuss the question of what right an alien enemy would have to rely upon the protection guaranteed by the Fifth Amendment *in the absence of such legislation*. As an illustration of the general trend of these cases reference may be made to the leading case of *Miller* vs. *U. S.*, 11 Wall. 268, 20 L. Ed. 135 (*sub nom. Page, Exr.* vs. *U. S.*), cited in the opinion of the Court below. The decision in that case upholds the right of Congress in time of war to seize and confiscate enemy property regardless of the restrictions imposed by the Fifth and Sixth amendments. With this decision the appellant in the case at bar has no quarrel. Unquestionably the confiscation of enemy property is a right possessed by every sovereignty What it is here desired to emphasize as strongly as possible is, that unless the intent to exercise this right is indicated in plain and unmistakable terms (as it was in the Civil War Confiscation Acts) such intent will never be presumed, because it is contrary to the enlightened law of nations and to the traditional policy of the United States.

The distinctions between the legislation just discussed and the Joint Resolution involved in the present case

are many and obvious. In the former, the provisions regarding seizure are mandatory; in the latter they are permissive only. The act of 1861 extended only to property used or intended to be used in aid of the enemy. The Joint Resolution here in question does not make the use or intended use of the ships a criterion of the right of seizure. The act of 1862 rendered property condemnable only in consequence of the personal guilt of its owner. The Joint Resolution here in question in nowise refers to guilt, and, so far as this appellant is concerned, is leveled against property belonging to corporations, which, in the nature of things, could not be guilty of such offenses—treason and rebellion—as those which afford the basis for confiscation under the act of 1862. Furthermore, the corporation appellant in the instant case derived its corporate being not from the United States, but from an independent sovereignty. The act of 1862 provided for the condemnation and sale of seized property. The Joint Resolution here in question contains no such provision, but on the contrary an amendment providing for condemnation was voted down in the Senate (Cong. Record, Vol. 55, Part 2, p. 1575).

Concerning the Civil War Confiscation acts, the Attorney General, at p. 204 of his brief in *U. S.* v. *Chemical Foundation* (*supra*) says: "* * * The purpose of all these acts was to punish American citizens for acts of disloyalty, and although they were later sustained on the doctrine of seizure of enemy property, the legislation cannot be cited as a precedent for confiscation of enemy property during the war just ended."

The Civil War Confiscation cases therefore do not give support to the proposition that the property of a corporate alien enemy, found within the United States, is deprived of the benefit of the Fifth Amendment because of the circumstance of war between the country of its creation and the United States.

It is believed that this precise question has never before been presented to any American court. To attain a correct solution it should be considered from the point of view of both reason and authority. The first ten Amendments to the Constitution were adopted December 15, 1791, having been recommended by the Congress at its first session and under the influence of the framers of the Constitution. Being intended to supply defects in the original instrument, they may be considered practically as a part of the original instrument. The statesmen who framed the Constitution were aware that they were establishing the fundamental law of a country which was already large, and, by reason of its relation to the unsettled remainder of the continent, was doubtless destined to expand; but that, due to the improverishment occasioned by the Revolution and worthlessness of the paper currency, development of its natural resources could not take place unless foreign capital could be attracted. Furthermore, they had witnessed the confiscations of enemy property effected by some of the State Legislatures during the Revolution, and the disastrous results of such a policy.

Franklin, one of the leaders among the founders of the Republic, had himself been a signer of the Definitive Treaty of Peace with Great Britain of 1783 (Treaties and Conventions between the United and other powers, Government Printing Office, 1889, p. 375), which contained the provision (Art. V.) that

> "It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective states, to provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real British subjects, and also of the estates, rights and properties of persons resident in districts in possession of His Majesty's arms

and who have not borne arms against the said United States."

These facts are eloquent concerning the deliberate intent with which the founders of the Government employed, in the Fifth Amendment, apt language to protect the property of the alien no less than the property of the citizen, and the property of the enemy lawfully here at the outbreak of war no less than the property of a friend. Certainly if a contrary intention had been expressed it would have been impossible to procure funds from abroad for the development of the territories of the new nation. Quite as certainly, in view of the unfortunate experience of British property owners in some of the States, the employment of language which left the matter in doubt would have been equally fatal. The understanding of that time must have been that the Fifth Amendment *extended a protection over all property regardless of its owner.*

Subsequent developments did nothing to disturb this reasonable understanding. Neither in the War of 1812 nor in any of our subsequent wars, except that between the States, was confiscation adopted, and the confiscations incident to the war between the States were, on their face, *based upon the theory that citizens had violated their allegiance.*

Approaching the question from the point of view of authority, we find that Alexander Hamilton in "Camillus Letters" XVIII, says:

> "No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, *in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws,* on account of controversies between nation and nation."

How applicable are these words to the ships of the appellant, which came into our ports, while the United States and Germany were at peace, as ports of refuge or asylum to escape capture by the enemy.

And again ("Camillus Letters" XIX):

> "Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, *or to bring and deposit it there*, it tacitly promises protection and security."

In a speech made by Mr. Hughes, then Secretary of State, on Nov. 30, 1923, he said:

> "Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws."

Most pertinent of all are these words from President Wilson's war message of April 2, 1917:

> "The Government of the United States will in no circumstance take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title."

The arguments under this point may be recapitulated as follows: (1) that the words of the Fifth Amendment, if given their natural meaning, embrace the property of alien enemies which was brought into the United States during peace, no less than the property of citizens; (2) that the circumstances existing at the time of the adoption of the Amendment indicate that such was its intention; (3) that the utterances of our statesmen clearly point to the propriety of such a construction; (4) that no American decision runs counter to such a construc-

tion; (5) that American practice has consistently been in conformity with such a construction.

It is respectfully submitted that in view of these circumstances an American court called to pass upon this precise question for the first time, ought to decide that the alien enemy property owner is entitled to the benefits of the Constitution, and, in deciding otherwise, would run counter to every prior act and word in the history of America which serves to throw any light upon the decision of the question. It would also run contrary to the rule for constitutional interpretation laid down by this Court, which is that

> "* * * constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance." *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, 37 L. Ed. 463.

Particularly applicable to this discussion of the extent of the application of the Fifth Amendment are the words of the Supreme Court in *Ex parte Milligan*, 4 Wall. 2 (at pp. 120 and 121) (18 L. Ed. 295):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the Government, within the Constitution, has all the powers granted

to it which are necessary to preserve its existence, as has been happily proven by the result of the great effort to throw off its just authority."

The statement is that its protection covers "all classes of men." This is because it was the right of *personal liberty* which was then in question before the Court. It is inconceivable that the Court would have declared otherwise with reference to *property*, if the question before it had been one of confiscation, not imposed as a punishment for crime or the personal delinquency of the owner.

The Court below states in its opinion (R., 12) that if suits by the German ship owners are authorized, such suits could have been instituted as soon as the President took action under the Joint Resolution of May 12, 1917. It is respectfully submitted that the Constitutional interpretation contended for by the appellant does not lead to or justify any such conclusion. No legal principle is more generally accepted than that alien enemies are barred from resort to the courts of a country while a state of war exists, except in so far as such resort may be necessary to protect their rights when brought into such courts as defendants. What the appellant asserts is a claim, after the close of the war, to the rights guaranteed to it by the Constitution, which continued unimpaired throughout the war, but the exercise of which was suspended while the war continued.

F. Neither the Peace Resolution nor the Peace Treaty bars the appellant from claiming compensation.

Although this point was not touched on by the Court below in its opinion, it was contended by the Government in that Court that the Peace Resolution of July 2, 1921 (the so-called Knox-Porter Resolution) and the Treaty of Berlin "carried into and incorporated in the

substantive law of the United States" the provisions of the Treaty of Versailles, in particular article 297 and the Annex thereto, and that as a result the appellant is barred from asserting any claim to compensation for its ships. For the sake of completeness it therefore seems advisable to discuss this contention briefly, in order to show that it is not well-founded.

As to the Peace Resolution.

This document has so far undergone no judicial interpretation, and, therefore, requires careful examination. In so doing there should be applied first a well settled rule of statutory construction, *i. e.*, that in construing a statute the Court will attempt first to reconcile all its parts, so that each may stand and be given its proper meaning and effect and so that no part shall, unless unavoidable, be treated as a nullity because at first view it seems to be in conflict with some later part. So also in construing two laws or a law and a treaty, one of which is of later date than the other, the same effort must be made, and it is only as a last resort, after reconciliation proves impossible, that the rule will be resorted to that a later statute or treaty supersedes a prior statute or treaty.

Rodgers v. *United States*, 36 Ct. Cl. 266, affirmed in 185 U. S. 83, 46 L. Ed. 816.
Frost v. *Wenie*, 157 U. S. 46;
Walker v. *Lawson*, 275 Fed. 373 and cases there cited.

The effect of this principle is to compel a construction of the Peace Resolution that will permit every section of it to be effective if possible, and will not, for instance, exclude a provision of Section 2 because a provision of Section 5 seems at first glance to run counter to it.

Section 2 provides:

> "That in making this declaration and as part of it, there are expressly reserved to the United States of America * * * any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same * * * to which it is entitled by virtue of any act or acts of Congress, or otherwise."

And Section 5 provides:

> "That all property * * * of all German nationals which was, on April 6, 1917, or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents or employees, from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until" * * * the German Government shall have performed certain conditions.

One of the *rights* acquired by the United States by *virtue of an Act of Congress*, and which is expressly reserved to the United States by Section 2, is the right (title) of the United States to the ships which it acquired pursuant to the Joint Resolution of May 12, 1917. Nothing could be clearer. The *right* to the ships is derived from the *Act of Congress*. The ships were never put through a prize court, and the only title or evidence of title the United States possesses results from the Joint Resolution and a Proclamation of the President. The important result is that the ships are not a part

of the property of *German nationals* directed by Section 5 of the Peace Resolution to be "retained and no disposition thereof made". The ships are the property of the United States. That the Government itself has taken this position ever since the passage of the Peace Resolution and the adoption of the Berlin Treaty on August 25, 1921, is a matter of public record. Since that time the United States has sold many of the German ships taken under the Joint Resolution of May 12, 1917. The records of the Shipping Board, of the Bureau of Navigation and of the various seaport custom houses where the ships were registered, disclose this fact. To cite one illustrative instance, the United States sold, in *August, 1922,* to the North German Lloyd, the steamer then named the "Pocahontas," now named the "Bremen," and originally named the "Princess Irene," under which name she was taken over by the United States from the North German Lloyd by virtue of the Executive Order of June 30, 1917, made pursuant to the Joint Resolution.

The point here made is of tremendous importance. We assert that by correct principles of statutory construction this ship property is outside Section 5 of the Peace Resolution. Our assertion is supported by the highest possible evidence, that is, the test of contemporaneous construction evidenced by governmental acts.

By another fact, the exclusion of the ships from the retention provision of Section 5 is established. That is, that the property to be retained is the property of *Germans,* which has "come into the *possession* or under *control* of, or has been the subject of a *demand* by" the United States, etc. Considering the meticulous care with which words are employed in framing such solemn documents as Treaties, the mind is *forced* to the conclusion that this phraseology was advisedly devised to *exclude* property *formerly* German owned, but the actual *title* of which, as distinguished from mere possession,

mere control or mere demand without either possession or control had passed to the United States. The lesser cannot contain or comprehend the greater.

The conclusion is irresistible that the words relate to property taken under the Trading with the Enemy Act, by a provision of which, previously quoted, Congress reserved to itself the right of disposition in such manner as it might see fit, after the close of the war; and that they exclude property to which the United States took actual title, such as the ships of claimants.

That this was the belief held by Senator Knox, one of the co-authors of the Resolution, is indicated by his explanation of the purpose of the Resolution made in the Senate on June 30, 1921 (Cong. Record, Vol. 61, p. 3397), in which he said:

> "The language the Senator has in mind *only has reference to the thing that has already been done by the Alien Property Custodian.* The whole theory is this: Speaking for myself personally, *I hope the day is not far away when we shall come back to the traditions of the American people that the right upon land of private property belonging to an alien enemy is a sacred right;* that such property may be taken into custody only for the purpose of conservation; and that at the end of a war there shall be a strict accounting to the owners of that property by the Government of the United States, which may take it temporarily into its possession. That is one of the principles for which this country has contended for a hundred years. While, as Chief Justice Marshall said, the Congress may have the power to provide that the private property of alien enemies may be taken during a war, it can only do so by putting upon itself a moral turpitude of which we ought to be ashamed.

"The purpose of the joint resolution is simply to hold in status quo the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany *for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it."* (Italics ours).

As to the Treaty of Berlin.

Article I of the Treaty of Berlin reserves to the United States all of the rights accorded by the Peace Resolution, namely: "any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

The reservation of these rights gave to the United States the option to exercise them or not, as it might wish. Unless and until those rights should be so exercised, the provisions of the Treaty of Versailles relating to them remained wholly inoperative, so far as the United States is concerned. Moreover, the rights could only be exercised "in a manner consistent with the rights accorded to Germany under such provisions" (Treaty of Berlin, Article II). As was said by Professor Hessel

Yntema in the Columbia Law Review for June, 1923 (Vol. XXIII, page 511):

> "It cannot be too much emphasized that the Treaty of Versailles has been definitely refused the ratification of the United States and is, therefore, not binding upon the United States *proprio vigore*. The situation is rather that the substance of certain of its provisions are to be read into the Treaty of Berlin *conditionally upon the assertion of claims by the United States in accordance therewith.*"

At no point has the procedure adopted by the United States in respect to claims or reparations followed that prescribed by the Treaty of Versailles. For example: The Allied Powers gave Germany credit on reparation account for all German tonnage seized and appropriated by them. No such credit has been given by the United States, but on the contrary, under the terms of Article 3(a) of the Paris Agreement of January 14, 1925 the United States will collect in full its claim for the costs of the American Army of occupation, as well the claims of American citizens against Germany (which together represent the nearest approach to reparations that the United States has demanded) out of a fixed proportion of the annual payments to be made under the Dawes Plan.

Another instance of the way in which the United States has diverged from the Treaty of Versailles is found in the fact that this country has not adopted for the disposal of seized German property any of the three methods provided by Article 297 of the Versailles Treaty. It has neither (1) adopted the Clearing House provisions, nor has it (2) returned such property direct to its owners, nor (3) used the proceeds of such property to satisfy American claims against Germany. On the contrary, the United States has adopted a method not contemplated at

all by the Treaty of Versailles, namely, by the creation of the Mixed Claims Commission. This body, so far as that Treaty is concerned, would have no right whatever to exist or function.

Not one instance can be cited in which the United States has exercised the right reserved to it by the Treaty of Berlin to avail itself of the provisions of the Treaty of Versailles; and to contend, in view of this divergence, that the Treaty bars appellant from claiming compensation for its ships, is to ignore the very terms of the Treaty itself.

II.

THE COURT BELOW ERRED IN HOLDING THAT IT HAD NOT JURISDICTION TO HEAR THE CASE AT BAR.

In order to give the Court of Claims jurisdiction over a claim against the United States, these elements must be present:

A. The claim must be founded on the Constitution of the United States, or on a law of Congress, or on a regulation of an Executive Department, or on an express or implied contract with the Government of the United States;

B. The claim must be one not sounding in tort; (36 Stat. 1136).

C. If claimant is not an American citizen, it must be shown that the courts of claimant's country grant reciprocal rights to American citizens (36 Stat. 1139).

These requirements are fully met in the instant case. The fact that the courts of Germany grant reciprocal rights to American citizens is not disputed. That appel-

lant's claim is founded on the Constitutional provision forbidding the taking of private property for a public use without compensation has already been demonstrated on pages 41 to 53 of this brief.

A. Appellant's claim is founded on an implied contract to compensate.

The assertion that appellant's claim is founded on an implied contract is amply justified by the decisions of this Court.

In *U. S.* v. *Great Falls Mfg. Co.* (1884), 112 U. S. 645 (at foot of p. 657), 28 L. Ed. 846 (2d column of p. 850), this Court states that the question before it for decision, is the great question that was reserved in the *Langford Case, viz.,* (in substance)

Whether, when the Government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims.

After stating the facts upon which the foregoing question arose the Court lays down the rule of law in the following words: (112 U. S. 656; 28 L. Ed. 850.)

> "* * * *we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the mean-*

ing of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

It is important to note that at the time of this decision, the statutory scope of the jurisdiction of the Court of claims was less extensive than now. The statute then in force provided (act of February 24, 1855, 10 Stat. at L. 612, Sec. 1) as follows:

> "That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behavior; and the said Court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said Court by either house of Congress."

The substantial difference (as respects the present case) between the statute of 1855 and the present one is, that the jurisdiction given by the 1855 Act did not expressly extend to claims founded upon the Constitution. Even so, however, this Court held that the constitutional provisions involved in the present case operated for the protection of plaintiffs under the earlier act, *and the Court applied the protection by holding that a taking which, if not compensated for, would violate the Constitution, raised an implied promise to pay compensation.*

To avoid the possibility of confusion we refer also to the separate and unrelated case of *Great Falls Manufacturing Co.* v. *Garland* (1888), 124 U. S. 581; 31 L. Ed.

527, for the purpose of pointing out that the act of July 15, 1882 (22 Stat. at L. 168), which related to the same water supply project and which especially conferred jurisdiction upon the Court of Claims in connection with questions which might arise under it, was not a factor in the decision of the case in 112 U. S. upon which we rely. This statute was not enacted until after the decision in the prior action in the Court of Claims (1880—16 Ct. Cl. Rep. 160), which decision, like that of the Supreme Court, was in favor of the plaintiff and upon like grounds.

At the same term at which the *Great Falls Manufacturing Co. Case* upon which we here rely was decided, this Court held that the right of the patentee under letters patent for an invention is exclusive as to the Government as well as to others, and by way of dictum observed:

> "If the right of the patentee was acknowledged and, without his consent, an officer of the Government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the Court of Claims, such as was entertained and sanctioned in the case of *U. S.* v. *Mfg. Co.*, decided at the present term." *Hollister* v. *Benedict*, 113 U. S. 59; 28 L. Ed. 901.

In *U. S.* v. *Palmer*, 128 U. S. 262, 32 L. Ed. 442, this Court affirmed a judgment of the Court of Claims allowing damages to the claimant for the Government's use of his patent, with his consent and with the expectation on his part of receiving a reasonable compensation for the license. The United States asserted that the matter was essentially tort and not an implied contract. The Court held otherwise.

The point is put entirely at rest by the decision in *U. S.* v. *Lynah* (1903), 188 U. S. 445, 47 L. Ed. 539, the facts in which are stated quite fully in an earlier part of this brief (p. 34). Justice Brewer, stating the majority opinion, discusses the cases of like character which had gone before and sums the whole matter up by repeating that part of the opinion in the *Great Falls Mfg. Co. Case* which we quote on p. 61 *ante*.

At the time of the decision of this case the statute conferring jurisdiction on the Court of Claims stood as it stands now. Of course, the force of this decision is not detracted from by the fact that what this Court affirmed was a judgment of the District Court and not the Court of Claims. The suit was instituted in the District Court because the amount claimed did not exceed $10,000, and the provision of the Judicial Code giving the District Court concurrent jurisdiction is in substantially the same words as the paragraph granting jurisdiction to the Court of Claims. (See 36 Stat. at L. 1091, sec. 24, par. 20).

The Court below, in support of its decision that no implied contract arose in the case at bar, stated that the circumstances surrounding the taking of private property by the Government may be such as to rebut the implication of a contract (R. 9); that the taking in the case at bar was an exercise of the war power of Congress (R. 9); and that the obligation of the Fifth Amendment to make compensation for private property does not affect the exercise of that power when enemy property is taken (R. 10).

It is undoubtedly true that Congress possesses the legal power to confiscate private enemy property (although that practice has long fallen into disuse among civilized nations); it is equally true that the limitations of the Fifth Amendment will not bar the exercise of this power, and that if confiscation were decreed by Congress

that fact would certainly rebut the implication of an implied contract to compensate. But these propositions are all predicated on *confiscation*, and it is precisely that which makes the Court's reasoning inapplicable to the case at bar. We have here no vestige of evidence that Congress effected, or intended to effect, confiscation by the Joint Resolution of May 12, 1917. Indeed, this is recognized by the Court below in its opinion (R. 13) as follows:

> "We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value."

The authorities cited by the Court in support of its assertion that there was no implied contract to compensate appellant will prove, on analysis, to have little application to the case at bar. *Green's Case*, 10 Ct. Cls. 466, the facts of which are set forth in detail in the opinion of the Court, dealt with enemy property seized *in hostile territory*, and the rule of law enunciated in that case expressly limits its application to "acts of (Government) officers done under color of its authority within the insurrectionary district".

So in *U. S.* vs. *Klein*, 13 Wall., 128, the cotton whose seizure was the basis of the suit, had been seized within rebel territory. The same was true in the *Moore Case*, 10 Ct. Cls. 375, when the rosin involved was seized in captured territory and by a military officer acting merely under military authority and not pursuant to any act of Congress.

The importance of this distinction was pointed out by Alexander Hamilton in his "Camillus Letters" XIX, wherein he said:

> "There is no parity between the case of the persons and goods of enemies found in our own country and that of the persons and goods of enemies found elsewhere. * * * In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force."

Every writer on international law has emphasized the difference between the principles applicable to taking, for the use of the military forces, the property of the enemy found in the enemy's country or in the theatre of war, which is permitted, and taking his goods found outside the theatre of war and in the territory of the other belligerent, concerning which the doctrine of courts and writers ranges from the declaration that such property "may be taken although not without obloquy" (Chief Justice Marshall, *Brown* v. *U. S.*, 8 Cranch 110) to the doctrine announced by Mr. John Bassett Moore, quoting Hall, that "property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation" (Moore's Digest of International Law, Vol. 7, p. 308), which doctrine is especially applied to merchant ships in the Hague Conventions, 1907 (*supra*, p. 18), in guaranteeing them the right to depart, or in lieu of the same, restoration after the war or requisition on payment of compensation.

Young's Case, 97 U. S. 39, from which the Court below quotes in its opinion (R. 11), has no bearing whatever on the case at bar. All that was decided by that case was that a British subject whose cotton had been seized in Confederate territory during the Civil War and who had given aid and comfort to the rebellion, was thereby

excluded from the privilege granted by statute to sue for the proceeds of his property, title to which (but for the statute in question) would have been forfeited absolutely to the United States under the Confiscation Acts; because being a British subject, he had by his actions committed no criminal offense against the United States and was therefore not included in the general pardon and amnesty granted to rebels.

B. Appellant's claim is one not sounding in tort.

This Court, in the case of *U. S.* vs. *Lynah* (188 U. S. 445, 47 L. Ed. 539) has laid down a clear rule of guidance to distinguish between cases of implied contract and cases of tort as affecting the jurisdiction of the Court of Claims. Preceding decisions are discussed and it is made to appear that the cases in which a taking of property is to be considered as a tort, and therefore not giving rise to jurisdiction, may be classified under two general descriptions: (a) where Government officers have committed an unauthorized act, and (b) where the taking is based on a claim of title in the Government. In these two classes of cases it must be conceded that the taking is tortious and does not give rise to a right of action. But, to quote Mr. Justice Brewer in the *Lynah Case*, "How different is the case at bar!"

In the case at bar there was no unauthorized act. The Joint Resolution gave explicit authority and the officers who took possession acted pursuant to the executive order which was based on the Joint Resolution and set forth its terms in full. Neither was there any claim of title in the Government. On the contrary, both the Joint Resolution and the executive order expressly recognize title in others. Tort, therefore, is entirely outside the case, and so far as the theory of tort is concerned the case is ruled by the pronouncement in *U. S.* v. *Lynah* (p. 464 of 188 U. S., p. 546 of 47 L. Ed.) that

> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

The Court below apparently believed that the facts in the case at bar remove it from the operation of the rule just quoted; and in support of that belief cited the cases of *Ribas y Hijo* vs. *U. S.*, 194 U. S. 315 and *Herrera* vs. *U. S.*, 222 U. S. 558.

Both of these cases grew out of the seizure of ships during the war with Spain. In the *Hijo* case a merchant ship of Spanish registry was taken at Ponce, Porto Rico, by the United States naval and military forces on the capture of that city, and was thereafter used for some months by the Quartermaster's Department of the army. This Court on page 322 of its opinion said:

> "Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an executive department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. * * * The seizure, which occurred while the war was flagrant, was an act of war, *occurring within the limits of military operations.* The action, in its essence, is for the recovery of damages; but as the case is one sounding in tort, no suit for damages can be maintained under the statute, against the United States." (Italics ours.)

The facts in the *Herrera* case were identical, except that the ship was seized shortly after the *surrender* of

the city where it was found, instead of after a *capture*. This Court based its decision largely on the *Hijo* case, and said (quote 222 U. S., p. 572):

> "We must regard the seizure of the *San Juan* as an exertion of the war power, and by this we do not mean as mere 'booty of war,' and the comments made in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 495, in regard to an attempt by the commander at New Orleans, fifteen months after the occupation of the city by the National Government, to confiscate the indebtedness of one of the banks to the other, do not apply. We only mean that the seizure was for the immediate use of the army, a right recognized in that case, for we do not accept the view contended for by claimants that with the surrender of Santiago and the cessation of active operations in the Santiago district enemy property lost such character and was not subject to such right of capture. The war was flagrant elsewhere, and in such case *Planters' Bank* v. *Union Bank* is authority for the right, not against it."

This Court said further that if it were to be assumed that the vessel there in question was immune from seizure, and if that seizure was in violation of a Presidential proclamation relied on by the claimant, then the acts of the officers who seized and used her were done in wrong, "and the claimants encounter the prohibitions of the Tucker Act against the jurisdiction of the Court of Claims" (p. 573).

With these decisions we have no quarrel. What we wish to emphasize is that both cases deal with seizures made in hostile territory, for the immediate use of the military forces of the United States, and on the discretionary orders of military officers; and in citing these cases as authority for the case at bar, wherein the seizure was lawfully made pursuant to an Act of Congress, with-

in the territory of the United States, and months before any military operations were organized, the Court below apparently overlooks the vital distinction between the two kinds of seizure. This distinction has been pointed out not only by Hamilton ("Camillus Letters", p. 66 *supra*) but by many other writers on international law. See:

Bentwich, Private Property in War, London, 1907, p. 41.
H. Rep. 386, 22nd Cong., 1st Sess., pp. 9-10.
Lawrence's Report on Claims against Governments, H. Rep. 134, 43rd Cong., 2nd Sess., 126.
Nys, Droit International (1912 ed.) v. III, ch. XI, pp. 450-462.

C. The fact that the joint resolution did not specifically confer jurisdiction on the Court of Claims does not bar it from such jurisdiction.

The Court below, in support of its decision that it was without jurisdiction over the case at bar, remarked (R. 12):

"The power to hear and determine suits against the United States should not and does not rest in mere inference or implication".

The truth of this statement may readily be conceded. But when it has been established that a particular claim falls within any of the classes of cases as to which the United States has expressed its willingness to be sued,—as for example, that the claim is founded on the Constitution, or on an Act of Congress, or an express or implied contract—then it is not a mere inference or implication to assert that the determination of such claim comes under the general jurisdiction of the Court of Claims. Were this not true, how purposeless would be Section 145 of the Judicial Code, wherein are enumerated the various kinds of claims over which that Court is given jurisdiction.

In support of its reasoning the Court below points out (R., 12) that in various statutes enacted during the recent war authorizing the taking of private property, the courts were designated wherein claims for compensation might be brought. To argue that because in certain instances this was done, therefore no jurisdiction was conferred in instances where it was *not* done, is unsound logic. That such reasoning is fallacious is illustrated by the case of *Duckett & Co.* vs. *U. S.*, 45 Sup. Ct. Reporter 38, referred to *supra* at p. 39. In that case the statute authorizing the seizure of claimant's property made no reference to any forum for the determination of such claims, and the Court of Claims dismissed the suit on the ground that no contract with the claimant could be implied (58 Ct. Cls. 234, 403). This Court, however, in reversing the decision said: "there is no doubt concerning the jurisdiction of the Court of Claims." (p. 39).

In its opinion in the case at bar the Court below points out (R., 12, 13) that the last three sections of the Joint Resolution as originally drawn, one of which authorized suits in the Court of Claims by parties interested in the seized ships, were stricken out by amendment in the Senate, which action was concurred in by the House. This, the Court asserts, indicates an intention on the part of Congress not to authorize suits in that Court.

Since the Court below has deemed it proper to refer to the history of this enactment while it was before Congress as a guide to its construction, it is permissible to consider the details of that history and to examine the journals and debates of Congress relating to the enactment. On doing so, it appears that when the Joint Resolution in its original form was reported to the Senate by the Judiciary Committee on April 30, 1917, the debate in that body contained only one speech dealing with the question of whether the owners of the seized ships should

be relegated to the Court of Claims for compensation. This speech was made by Senator Lewis of Illinois, who spoke on the question as follows (Cong. Record, Vol. 55, Part 2, page 1574):

> "Now, second, I regard it most unwise from my viewpoint that we should provide in a measure that the foreign country to be paid or its people to be paid that these shall go into the Court of Claims of the United States. We have a specific act creating the Court of Claims. We have authorized our citizens to go into that court; and they must go into the court, as the eminent Senator recognizes, to have their claims adjudicated; and then there has to be an act of Congress to satisfy the judgment. We ought not to do such a thing in the case of foreigners or foreign countries.
>
> "The method the able Senator from Pennsylvania suggests appeals much to me," (Note by counsel—this was a requisition for use, with payment of compensation for such use after the war).
>
> "If we are to adopt a method at all, sir, it should be through the diplomatic department or through the Executive department, in so far as compensation is to be provided. We ought not to provide here, sir, that it should be done by forcing these people to come into the Court of Claims, litigate in the United States in a forum that is distinctively ours. After the war is over an international tribunal, or some kind of a tribunal that is not distinctively a forum of our own, ought to be created in which some of their people have a right to sit in the judgment—some diplomatic officer or some commissioner. We should not now say that they shall come into our court with our judges, our lawyers and our advocates—our trib-

unal. That, sir, does not appeal to me to be in the spirit of the meaning of the treaty,* and at the very outset will give, if not cause, atmosphere to the charge of direct unfairness; and as I see it, in direct violation of all international precedent in matters of this kind."

(After an interruption in which it was suggested that the matter be considered in executive session, Senator Lewis continued as follows):

"I now wish to ask—and to this I invite the attention of Senators—third, is it wise that we should provide in a measure, if we pass any at all, remitting these people to our courts solely and wholly, refusing any audience——"

(Here Senator Lewis was again interrupted with the suggestion of an executive session, and immediately thereafter a vote was taken on the proposed amendments to the Joint Resolution, as a result of which Sections 3, 4 and 5 were stricken out).

If significance is to be attributed to the striking out of the provisions relating to the Court of Claims, equal significance must be attributed to the only reason disclosed by the records of Congress which actuated the Senate in striking out these provisions. If this be done, it is clear that their motive for taking this step was not to *deprive* the Court of Claims of jurisdiction, but to avoid *restricting* claimants to that forum, where even after the war they might conceivably be placed at an unfair disadvantage; and by not limiting claimants to a particular method of redress, to leave them free either to exercise their legal right to resort to the Court of Claims, or to apply to such tribunal as might thereafter be created to pass upon their claims.

* The treaty with Prussia of 1828.

To determine the true meaning and purpose of the Joint Resolution, no better rule can be applied than the one stated by this Court in the case of *Texas and Pacific Railway* vs. *Interstate Commerce Commission*, 162 U. S. 197, in which it was said (p. 218):

> "It must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power."

The legislation here in question was experimental. No act precisely like it had ever before been adopted by this country. To interpret it as confiscatory or as barring appellant from the only forum in which a claim could lawfully be presented, would be contrary to the genius of our institutions and the principles on which our Government is founded.

If this rule be applied, no difficulty will be encountered in holding that appellant's petition sets forth a cause of action against the United States, that the Court of Claims has jurisdiction, and that its judgment should be reversed and the case remanded to that Court for a hearing on the merits.

Respectfully submitted,

WILLIAM B. DEVOE,
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15 Park Row,
New York City.

September 28, 1925.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1925.

No. 23, 12

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT,
Appellant,

Versus

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM COURT OF CLAIMS.

Compensation for Expropriated German Merchant Ships.

BRIEF FOR APPELLANT.

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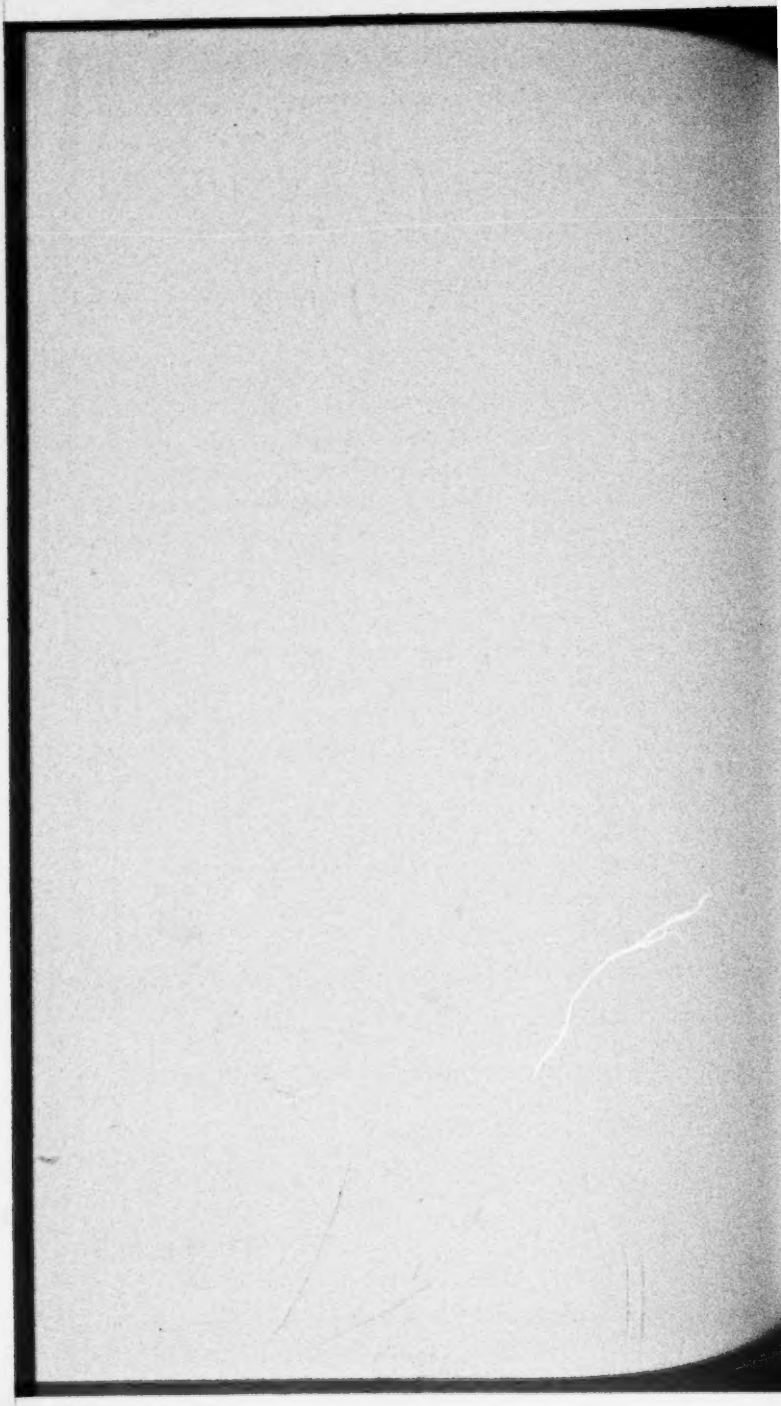

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Supreme Court of the United States

October Term, 1925.

No. 126.

DEUTSCH-AUSTRALISCHE DAMPF-SCHIFFS-GESELLSCHAFT,
Appellant,

VERSUS

THE UNITED STATES OF AMERICA,
Apellee.

BRIEF FOR APPELLANT.

Compensation for Expropriated German Merchant Ships.

The Opinion Below.

For opinion below see *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *United States*, 59 Ct. Cls. 450, and transcript in this case, page 5.

Grounds on which the Jurisdiction is Invoked.

The judgment under review (sustaining defendant's demurrer) was entered in the Court of Claims March 17, 1924 (R. 5).

In that court appellant contended that the United States was obliged, by virtue of the Constitution, (Amendment VII), a Joint Resolution of Congress adopted May 12, 1917 (40 Stats. 75, this brief, page 4) and implied contract, to pay appellant the fair and reasonable value of certain merchant ships belonging to it and expropriated by the United States, (Petition R. 3).

The defendant demurred on the ground that the petition did not state a cause of action.

The Court of Claims sustained the demurrer solely on the ground that it did not have jurisdiction of the suit (R. p. 5-11).

Appeal was applied for and allowed June 16, 1924, pursuant to Sections 242 and 243 of the Judicial Code (36 Stats. 1157) as the same then stood.

The said sections 242 and 243 of the Judicial Code (36 Stats. 1157) read as follows:

> "(Jud. Code, §242.) *Appeals from Court of Claims.*
>
> An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one hundred and seventy-two."
>
> "(Jud. Code §243) *Time and manner of appeals from the Court of Claims.*
>
> All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct."

Therefore in this case, the amount in controversy exceeding $3,000.00 (R. p. 4) this appeal from the Court of Claims is in this court as a matter of right. *U. S.* v. *Adams,* 6 Wall. 101.

The most analogous case sustaining the jurisdiction of the Court of Claims and this court, is the case of *A. W. Duckett & Co.*, v. *U. S.*, 266 U. S. 149.

Statement of Facts.

In the above entitled proceeding, typical of fifteen others, listed in Appendix A, and now pending awaiting the determination of this appeal, the claimants seek to recover from the United States Government the value of certain vessels owned by the claimants. On or before April 6, 1917, these vessels had sought asylum in various harbors of the United States or its possessions or its dependencies, or else were in the harbors of the Republic of Cuba, by which government they were delivered to the United States shortly after the outbreak of the war. With the exception of those in Cuban harbors turned over by Cuba to the United States, all these vessels were taken over by the President of the United States by executive orders under authority of a Joint Resolution of Congress of May 12, 1917 (40 Stats. at Large, 75) hereinafter set out in full.

The operative facts in the several cases are, for the purposes of this brief, identical. The claimant is a corporation of Germany, whose government accords to American citizens the right to sue it in the courts of Germany. The vessels, with the exception of those in Cuban harbors, were all in American harbors on the outbreak of the war. They were all merchant vessels and had sought asylum in our harbors under international law and American law, and were left unmolested until the United States entered the war in 1917; although in 1916, under the Ship Purchase Bill (Senate Bill 6856, Cong. Rec., 63rd Congress, 3rd Session, Vol. 52, Part I, page 321) it was proposed to have the United States Government purchase these vessels.

On April 6, 1917 the Congress adopted a Joint Resolution declaring the existence of a state of war between

the United States and the Government of Germany, and on or shortly after that date the vessels belonging to the claimants were taken under the control of agents acting under authority of the United States Government. On May 12, 1917, after lengthy debate, Congress adopted a Joint Resolution authorizing the President "to take over to the United States the immediate possession and title" of the vessels for which compensation is sought by these actions.

The Joint Resolution authorizing the President thus to take "possession and title" of these vessels reads as follows:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President be, and he is hereby authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken; or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the government to operate, lease, charter, and equip such vessel in any service of the United States or in any commerce, foreign or coastwise.
>
> Sec. 2. That the Secretary of the Navy be and he is hereby authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking and to make a

written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By executive order under this Joint Resolution the President, at various dates subsequent to May 12, 1917, did actually take possession and title in the name of the United States. The principal order was dated June 30, 1917, under which the possession and title of 69 German ships therein mentioned were taken over to the United States. That order, which is typical of the other orders, reads as follows:

"Whereas the following joint resolution adopted by Congress was approved by the President May 12, 1917:

Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

(Resolution quoted above in full)

"And whereas the following vessels were, at the time of coming into the jurisdiction of the United States, owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

* * * *

"It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to

repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

Since the date when the President thus took possession and title to these vessels, the claimants herein have been completely deprived of their vessels and of the use thereof, and have received no compensation of any kind for the property of which they have thus been deprived.

The petitions filed in these suits allege the suits to be founded upon the Constitution, the aforesaid Joint Resolution, an implied contract to pay compensation, and a claim not sounding in tort. No action on these claims has been had in Congress, and it is averred that each claimant is the owner of his or its claim, that no assignments thereof have been made, that no suits are pending in any other court based upon the facts here involved against any person who was, in respect thereto, acting in behalf of the United States, and that the suits are brought within six years after the claim first accrued.

The Government filed a general demurrer to the petition of each claimant putting in issue the question whether the petition of the claimants stated a cause of action against the United States, and a cause of action within the jurisdiction of the Court of Claims. The claimants at the trial amended the petition by dropping the claim for the use of the vessels in addition to the value at the time of taking. Compensation for use was claimed only for those vessels operated by the United States without title having been taken, the status of a few ships turned over to the United States by Cuba.

The Court of Claims sustained the demurrer of the Government and dismissed the claimant's petition in

an opinion rendered March 17, 1924 (R. 5). The Court of Claims reached its conclusion on the following reasoning:

(1) That the claim was not founded on the Constitution, a law of Congress or an implied contract to pay compensation.

(2) That the taking of "possession and title" under authority of the Joint Resolution of May 12, 1917 was "an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water."

(3) That Congress had the power to confiscate all enemy property, though the Court and the Attorney General admitted that the taking of "title and possession" in these cases was not a confiscation. The Court stated: "We do not think it necessary to assert that there was a confiscation, nor to deny that Congress may have intended that the United States would at some time account for the vessels or their ascertained value."

(4) That the Joint Resolution did not specifically mention the Court of Claims as the forum for "all proceedings on any claim for compensation."

(5) That the Court of Claims had no jurisdiction, on the authority of cases arising in previous wars in which enemy property had been seized by the United States—though every one of these cited cases involved the seizure of enemy property in the course of military operations and in the area of war, not in the territory of the United States outside the area of war.

Specification of Errors.

The Court of Claims erred in denying that it had jurisdiction of the appellant's claim, for such jurisdiction is founded upon section 145 of the Judicial Code (36 Stat. 1136).

This section of the Judicial Code reads in part as follows:

"(Jud. Code, §145.) *Jurisdiction.*

The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against the United States.*

FIRST. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *"

Summary of Appellant's Argument.

The appellant argues

I. That under the very terms of the Joint Resolution, the United States did not confiscate the ships here in question, but took "possession and title" under an implied contract to pay for them. This is evidenced:

(a) by the text of the Joint Resolution;

(b) by uncontradicted statements of the members of the Committees and members of Congress which reported out and debated the Joint Resolution;

(c) by utterances of the President and executive officers of the United States in the consideration of this question;

(d) by the policy of the United States from the beginning of its history, as disclosed by its laws, the declarations of its statesmen and publicists;

(c) by the prevailing rules of international law, with which Congress indicated its intention to conform.

II. As the taking of "possession and title" were obviously not acts of confiscation, the only sustainable alternative is that it constituted an exercise of the power of eminent domain or requisition, and hence implied a promise to pay compensation.

III. Nothing in the Knox-Porter Resolution, the Treaty of Versailles or the Treaty of Berlin, bars the payment of compensation for these vessels.

IV. The Court of Claims had jurisdiction of these claims.

ARGUMENT.

I.

The United States did not confiscate the ships, but took "possession and title" under an implied contract to pay for them.

The important fact to determine in these cases is: *what did Congress actually do or purport to do* when on May 12, 1917, it authorized the President to take possession of and title to the German ships in American harbors on the outbreak of the war, the authority under which the President actually did take over to the United States the possession and title of the ships for which compensation is sought in these proceedings.

If, as can be demonstrated, Congress did not confiscate or intend to confiscate the privately owned merchant ships in question, the legal conclusion unescapably follows that American constitutional law assures to the owners compensation for their property thus taken over

to the United States, under Act of Congress, for the public use.

The Court of Claims sought to escape this conclusion by asserting that the taking was "an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water." Yet the court did not assert that the "taking" was an act of confiscation, nor did they deny that "Congress may have intended that the United States would at some time account for the vessels or their ascertained value."

Before proceeding to an examination of the Joint Resolution and the facts which took place under its authority, facts which give rise to the legal consequences predicating the Government's obligation to make compensation under an implied contract, it seems desirable to point out certain errors in theory and fact which it is believed misled the Court of Claims into its erroneous conclusion that there was no implied contract to pay compensation in these cases.

(1) The taking was *not* an exercise of the power of Congress "to make rules concerning captures on land and water." The occasion of the taking was the war, the same occasion which accounted for thousands of other takings of private property *in the United States.* But though war furnished the occasion, it was still an exercise of the power of eminent domain, and was so intended by Congress. The idea that the Fifth Amendment ceases to have effect in time of war is entirely unwarranted. *Duckett* v. *United States,* (1924) 266 U. S. 149; *Campbell* v. *United States,* (1924) 266 U. S. 368. The error is involved in the failure to distinguish between the exercise of the war power (a) on its internal domestic side within the United States, and (b) on its external, foreign side in enemy territory

or in the area of military operations; that is, between (a) the taking of private property for public use *within the United States* during war time, and (b) seizures of private property *in enemy territory* or *in the course of military operations*. These classes of takings are absolutely distinct in type, in theory, in fact and in law. The first class requires compensation under the Constitution and the Tucker Act; the second does not. To cite cases of seizures *in enemy territory* or *in the course of military operations* as authority for domestic takings for the public use is to overlook elementary and vital distinctions. The importance of the distinction will again be noted later on in this brief, with a reference to the cases cited by the Court of Claims.

But that the taking of these ships *in the harbors of the United States* was not an exercise of the power "to make rules concerning captures on land and water," but merely of the customary power to take property by eminent domain for public use when public necessities require, is evidenced by the Joint Resolution itself and by what actually took place. A "capture" is a hostile seizure made with a view to confiscation or condemnation. Had there been an intention to "capture" these vessels, the Joint Resolution would not have been passed, no provision would have been made for a valuation of the vessels by a board of survey, which value was to be used as "competent evidence in all proceedings on any claim for compensation," and the vessels would have been put through a prize court and condemned, as "captured" vessels had always been from the beginning of American history and under an internationally uniform practice. It is believed that the Court of Claims was led into its error through certain decisions of the Supreme Court interpreting the Trading with the Enemy Act. *Stoehr* v. *Wallace*, 255 U. S. 239, 242; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. The word "capture" is a term of art and has

a well-defined meaning of a hostile seizure with a view to confiscation. The sequestrations under the Trading with the Enemy Act were *not* exercises of the power "to make rules concerning captures on land," as Judge John Bassett Moore, the most eminent authority on these subjects, has taken occasion in his recent book to point out. The Supreme Court should, it is most respectfully submitted, take an early opportunity to correct this misapprehension in the interpretation of the Trading with the Enemy Act, for it has been relied on by inferior courts throughout the United States and has given the Trading with the Enemy Act a construction it was not intended to have. Judge Moore, with particular reference to this misapprehension of the Supreme Court, has said of the Trading with the Enemy Act:

> "This was not, nor did it purport to be, an exercise by Congress of its constitutional power 'to make rules concerning captures on land and water.' The word 'capture' is in law a technical term, denoting the hostile seizure of places, persons or things. Men in arms are 'captured,' but a non-combatant is seized or arrested. A defended city, if taken, is said to be 'captured;' if undefended, it is 'occupied.' Property is said to be 'captured,' only when seized, in a hostile sense, under claim of forfeiture or confiscation. *These distinctions are very elementary.* The idea of provisionally holding enemy property in custody in order to prevent its use in the enemy interest is by no means new. In England, it is at least as old as Magna Carta. No one understood the act of Congress to contemplate a hostile seizure. The very terms of the act preclude such an interpretation. It merely authorized the provisional holding of the property in custody, and appropriately styled the official, who was to perform this function, the Alien Property Custodian."

(Moore, *J. B.*, International Law and Some Current Illusions, New York, 1924, p. 20).

(2) The Court of Claims states that "the action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in the plaintiff." But the "joint resolution" has the same effect as a law of Congress. When the Resolution authorized the President to take "possession and title" and "he did so," recognizing the claimant's title to these vessels, all the elements of an implied contract were present within the words of several leading decisions in this Court:

> "When the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title it impliedly promises to pay therefor."
>
> *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330, 333.
> *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645.
> *United States* v. *Lynah*, 188 U. S. 445, 462.
> *United States* v. *Cress*, 243 U. S. 316, 329.

It seems a novel interpretation of the court's jurisdiction to hold that the joint resolution must have "in terms declared a liability of the Government or of itself create a right in plaintiff." In the *Duckett* (*supra*) and *Campbell* (*supra*) and *Portsmouth* cases (260 U. S. 327, 330) the statute declared no liability and the very words "implied contract" usually preclude an express declaration of liability. The Joint Resolution of May 12, 1917, however, goes in fact almost to the point of an express declaration of lia-

bility, and is surely sufficiently clear to indicate the intent of Congress to act lawfully and to pay compensation to the owners of the property taken. The cases cited by the Court of Claims in this connection seem irrelevant. In *Ludington's* case (15 C. Cls. 453) the statute expressly denied the jurisdiction of the court. In *Hukill's* case (16 C. Cls. 562) and in *Hvoslef's* case, 237 U. S. 1, 11, the intention of Congress to permit suit was clear. So it has been in dozens of other cases. But many claims have been allowed against the United States on implied contract either where the statute was not clear or where, in fact, there was no statute at all. See the celebrated cases of *United States* v. *Lynah*, *United States* v. *Great Falls Mfg. Co.*, *supra*, and *Duckett* v. *United States*, 266 U. S. 149; *Campbell* v. *United States*, 266 U. S. 368. *Acts* determine the relations of the parties. When those acts are done under statutory authority, and take private property for public use, the law imposes liability, and the circumstances and the statute need not be so strong and positive as they are in this case in order to spell out an implied contract. If it is not an implied contract, the taking must be a tort, as the Attorney General in fact contended in the Court of Claims. It seems unnecessary to stop to refute the assumption that a taking of private property by the President under authority of Congress might have been a tort.

(3) The Court of Claims suggests that, "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court." This is quite true, and strengthens the claimant's case. Had the United States not taken *possession and title* by eminent domain, the Custodian would have taken the property in custody, and title would still be in the

claimants, as in the case of all other property held by the Custodian. Had he sold the property, the proceeds would admittedly have been held for the claimants. Congress expressly declared that the rights of the *owners* would be determined by subsequent legislation, which expressly negatived any suit by those owners. As there was no taking, but only a temporary embargo, there naturally was no jurisdiction in the Court of Claims. But Congress provided in the case of these ships, not for mere sequestration by the Custodian, but for a complete taking of *title* by the United States and provided that the amount due the claimants was to be established by a board of survey which finding was to be *"competent evidence in all proceedings on any claim for compensation."* Does this language suggest "capture" or "confiscation?" Had Congress taken *title* to a German-owned factory in the United States, instead of providing for custody by the Alien Property Custodian, can it be doubted that compensation would legally have been due the owner under eminent domain? Congress provided one method for dealing with certain property—*sequestration;* they provided another method for dealing with piers, docks, ships, bunker coal, etc.—*expropriation.* They clearly avoided any inference of *confiscation,* which in fact not one person has suggested in the course of the consideration of these cases. As the proceeding was expropriation, compensation must necessarily follow, and through legal, not political channels.

(4) Enemy private property *in the United States* enjoyed the full protection of the law and the Constitution. Theoretically, by violating international law and traditional American policy, Congress might have confiscated it. They very carefully avoided any such inference. It therefore had the same legal protection as other private property. If taken for public use, compensation was necessarily due. In this respect, there is no

difference between the alien and the citizen. Even though an alien enemy owner of expropriated property might not have been able to bring his action during the war, he had six years within which to sue and the privilege of suit was unimpaired the moment the war ended. His right to compensation was not affected by his delay in bringing suit.

(5) Ships in port enjoyed the same legal protection as private property on land. This will be demonstrated in the course of the discussion below.

An examination of the historical facts in connection with the Joint Resolution of May 12, 1917, under which the United States Government has acted in the matter of the German ships, will, it is believed, establish to a demonstration that Congress did *not* undertake to seize these ships without compensation; in other words, to confiscate them. It is not denied that Congress had the power and privilege to take possession and title to the ships in American harbors, as they had such power and privilege with respect to any private property in the United States. It is, however, denied, as a matter of fact and as a matter of law, that Congress did or purported to take over these ships without placing the United States Government under a duty to make compensation. Surely, it will not be contended that the war alone changed the rights of the owners and the legal protection enjoyed by the property under American constitutional law; if the property was confiscated, that effect must be found in the terms of the Joint Resolution. Examination of the facts leads to only one conclusion, namely, that Congress intended to act lawfully and did so act, and that they intended that compensation should be paid the expropriated owners. They did everything necessary to place the United

States under a duty to pay compensation, and the Court of Claims is the appropriate forum to enforce that duty.

In order to establish the accuracy of this conclusion, it is proposed to examine:

(a) the text of the Joint Resolution,

(b) the statements of the members of the committee and members of Congress which reported out and debated the Joint Resolution,

(c) the utterances of the executive officers of the United States in the consideration of this question,

(d) the policy of the United States Government from the beginnings of its history as disclosed by its laws, the declarations of its statesmen and publicists, and

(e) the prevailing rules of international law governing this subject.

From this examination it is believed that the unescapable conclusion follows that Congress, in the Joint Resolution of May 12, 1917, contemplated the payment of compensation to the owners, that Congress purported to act in accordance with the traditions of the United States and not contrary thereto, that such was the understanding of the executive officers of the Government, and that in the consideration of the Joint Resolution Congress was well aware of the fact that American law and tradition and the rules of international law required the United States to compensate the owners of the seized ships.

(a) The Text of the Joint Resolution:

It is not denied that Congress had the legal power to undertake the act of confiscation, had they been so disposed. By so doing they would have violated every

tradition of the United States in this matter and would have stultified the national record beyond repair, but they might, so far as power is concerned, have confiscated the vessels, had they seen fit. The important and the operative fact in these cases, however, is that they did *not* confiscate or purport to confiscate the vessels to which they authorized the President to take "possession and title."

The Joint Resolution authorizes the President

> "To take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof * * * which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war."

Section 2 authorizes and directs the Secretary of the Navy to appoint a board

> "whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein at the time of its taking * * *. *These findings shall be considered as competent evidence in all proceedings on any claim for compensation.*" (Italics ours throughout this brief.)

It is apparent from the wording of the Joint Resolution that there is no word in it concerning confiscation, but that, on the contrary, it makes a direct statement that the valuations to be made by the Secretary of the Navy are to be "competent evidence in all proceedings on any claim for compensation." The express use of the words "claim for compensation," shows that Congress contemplated that claims for compensation would necessarily be brought by the owners; it is evidence of the fact that Congress realized that it would have been little short of anarchistic to simply take the vessels away from their owners without provision for compen-

sation. The reference to the "claim for compensation" negatives beyond revival, it would seem, any suggestion that the action of the Government was an act of confiscation, excluding any right to compensation.

That the claim would necessarily be instituted in the form of judicial proceedings is patent from the clause, "these findings shall be considered as *competent evidence in all proceedings* on any claim for compensation." "Proceedings" means "legal proceedings" not petitions to Congress for redress. The debates in Congress make this very clear, and they may be looked to as cumulative evidence of the facts.

It will also be observed from Section 1 of the Joint Resolution that the authority therein given to take possession and title of vessels included any vessel "which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject" of any enemy nation or "flying the flag of, or under register of any such nation," etc. It was not only ships owned by Germans which were thus authorized to be taken over, but ships in which the largest share may have been in American citizens or aliens of non-enemy nationality. The smallest German interest in any vessel, or the fact that it flew the German flag, or was under German register, regardless of the question of ultimate ownership, sufficed to make the vessel the subject of Presidential requisition. Moreover, not her present ownership or flag or register, but her ownership, flag, or register *in 1914* or at the time she entered an American harbor was the test of her subjection to expropriation or requisition. Changes in ownership, flag, or register since 1914, for the purposes of the authorization in the Joint Resolution, were not recognized.

Surely it could not be said that in the broad authorization to take over ships admittedly owned by persons other than German citizens, it was the inten-

tion of Congress to confiscate the vessels. Not only is there every presumption against such an astonishing inference, but the reference to "claims for compensation" in Section 2 of the Joint Resolution precludes the possibility thereof. It is evident that Congress realized that others than German citizens owned an interest in some of these vessels, yet it is also evident that all owners were to be treated alike. It could hardly be supposed that it was intended that all owners were thus to be despoiled and their property confiscated. The correct conclusion seems to be that all owners were thereby to be placed on a legal footing in accordance with American principles of constitutional law, and that American, like German and other owners of these vessels, would, in due time receive the compensation to which American public law entitled them.

The provision for "proceedings on any claim for compensation" applies obviously to the owners of the expropriated vessels, the valuation of which was provided for. It does not contemplate *some* owners or some persons other than owners. Any such suggestion seems specious and unwarranted.

The failure of Congress to distinguish between American and German and other foreign private owners is one of the strongest grounds to negative the belief that confiscation was contemplated.

The fact is that in the case of the Austrian steamer *Martha Washington*, title to which was taken under the Joint Resolution, the United States subsequently paid compensation for her use prior and subsequent to the taking of title. The vessel has since been returned to its owners.

By making compensation for the use of the Austrian ship *Martha Washington* from the date of the declaration of war with Austria on December 7, 1917, down to May 11, 1918, when title was taken, and thereafter, evidence is established of the fact that the Government

did *not* confiscate these ships and did not purport to do so.

The Joint Resolution of May 12, 1917, was an act to enable the United States to take the use of private property for public purposes. Section 1 of the Joint Resolution expressly authorizes the President, "through the United States Shipping Board or any department or agency of the government to operate, lease, charter, and equip such vessel *in any service of the United States* or in *any commerce, foreign or coastwise.*"

The Resolution is in the same category with other acts during the war period, such as that, for example, of August 29, 1916 (39 Stats. at Large, 645), in which the President was empowered

> "through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, * * * for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Although this act does not even provide for a claim for compensation, it is a well known fact that millions of dollars were paid by the Government to the owners of the instruments of commerce thus taken under possession and control of the United States. *Duckett* v. *United States*, 266 U. S. 149. Surely the express mention of a "claim for compensation" in the Resolution of May 12, 1917, cannot be deemed to weaken the legal obligation under American public law to make compensation for the taking of private property for the public use.

Were further evidence necessary to demonstrate that Congress did not confiscate or purport to confiscate the ships in American harbors it would be found in the universal practice of nations, including the United States, to condemn as prize, ships it is intended

to confiscate. Had it been the intention of Congress to confiscate the ships, they would have been sent before a prize court and condemned as prize. (See A. Pearce Higgins, Enemy ships in port at the outbreak of war, British Yearbook of International Law, 1922-1923, p. 55 *et seq.*, where the practice of the various nations in the late war is outlined, and it is shown that where confiscation was undertaken, as in Portugal, the ships were condemned by a prize court).

When Congress has desired to confiscate property, as it did during the Confiscation Acts of 1861 (12 St. 319) and 1862 (12 St. 589), as a punishment for treason of those aiding the rebellion, it had no difficulty in making its meaning clear. The Act of August 6, 1861, provided that property used *in aid of the rebellion* should be the "lawful subject of a prize and capture wherever found; and it shall be *the duty* of the President of the United States to cause the same to be seized, *confiscated and condemned.*" The Act of 1862 was personal and was entitled "An Act to supress insurrection to punish treason and rebellion, *to seize and confiscate* the property of rebels, and for other purposes." Section 5 again provided that " it shall be the duty of the president" to cause the seizure of rebel's property to be thus made, and Section 7 provided that

> "to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof, or in any territorial court * * * within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases, and * * * the same shall be condemned as enemies' property and become the property of the United States * * *"

It will be observed that in these Acts of 1861 and 1862, in which Congress purported to take the private property of "enemies" *without* compensation, three important factors are strikingly evident: (1) the word "confiscate" is expressly used; (2) the President is placed under a *duty*, not merely *empowered*, in his discretion, to seize property; and (3) judicial proceedings for condemnation of the property are provided for.

In the Joint Resolution of May 12, 1917, on the other hand, not only is the word "confiscate" or any equivalent thereof not mentioned, as it surely would have been had there been any such intention, but on the contrary, a *"claim for compensation"* is expressly contemplated;

(2) The President is not placed under *any duty;* he is merely *"authorized"* for certain public purposes, to "take over to the United States the immediate possession and title of any vessel," etc. It is a matter entirely within his discretion to determine whether the vessels are needed and whether they shall be taken over and in what service they shall be placed. There is no word or implication of command or order to the President to seize vessels, as, with respect to valuation, there is in Section 2 of the Joint Resolution, where the Secretary of the Navy is "authorized *and directed*" to appoint a board of survey to ascertain the value of the vessels, and the board's "findings shall be considered as competent evidence in all proceedings on any claim for compensation." The difference in the expression of Congressional will with respect to the President (Sec. 1) and the Secretary of the Navy (Sec. 2) is significant, and indicates that the act of the President, under authority of the Joint Resolution, was entirely discretionary and voluntary. It could not have been confiscatory, therefore, but was an act of expropriation, lawfully

undertaken for a lawful public use and purpose authorized by Congress. It inevitably therefore implies the payment of compensation.

(3) The Joint Resolution makes no provision whatever for judicial proceedings to condemn the property, which Congress would hardly have omitted, in the light of established and universal precedents, had confiscation been intended.

It is believed that this comparison between a confiscatory and a non-confiscatory Act of Congress demonstrates that the Joint Resolution of May 12, 1917, far from being an act of confiscation was in fact and in law, an act of expropriation or requisition, undertaken therefore under the power of eminent domain.

Perhaps the most convincing proof that the Attorney General, now defending these cases, did not regard the Trading with the Enemy Act or any other war Act of Congress as an act of confiscation, is to be found in the Government's Brief and Reply Brief in the case of *United States of America* v. *The Chemical Foundation*, in the Circuit Court of Appeals, 5 Fed. (2nd) 191. Presumably the same position has been taken in the Government's appeal to the Supreme Court.

At pages 188 to 210 of the brief there is an elaborate argument to prove the evident fact that Congress did not, by the Trading with the Enemy Act or any other statute undertake to confiscate private property. After citing numerous decisions of the courts of the United States to the effect that Congress did not intend to confiscate and did not confiscate enemy-owned private property the Government's brief proceeds to point out (p. 196) that: "It is to be presumed that Congress, by the amendment of March 28, did not intend to violate the 'law of nations,' by authorizing confiscation of enemy property, unless the act clearly so directs." After referring to the declaration of Chief Justice

Marshall in *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, to the effect that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"—an injunction most applicable to the case at bar—the Government's brief analyzes the decision of the Supreme Court in *Brown* v. *United States*, 8 Cranch, 110. In the Government's brief in the *Chemical Foundation* case, *Brown* v. *United States*, *supra*, is interpreted as follows (Government's Brief, p. 197):

> "Chief Justice Marshall bases his decision largely upon the fact that the practice of nations has been *against* the exercise of this power of confiscation and that the Constitution was adopted in the light of this practice, and the President, by the declaration of war, was impliedly authorized to take only such steps as enlightened practice of nations recognized as proper war acts."

After quoting from Chief Justice Marshall's opinion a paragraph sustaining the above conclusion, the Government's brief proceeds (p. 198)

> "That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized."

After quoting at length (p. 199) from *Ware* v. *Hylton*, 3 Dallas 199, 254, passages to the effect that the ancient practice of confiscation must be considered "as a relic of barbarism," and that it "can not continue long among commercial nations; indeed, it ought not to have existed among any nations, and perhaps, is generally exploded at the present day in Europe," that it is "at once unjust and impolitic, it destroys confidence, violates good faith, and injures the interest of

commerce," the Government's brief goes on to point out the historical development of the doctrine, as traced by Chancellor Kent in *Clarke* v. *Morey* (N. Y. 1813) 10 Johns. 69 and then quotes at length from the XVIII and XIX Camillus Letters of Alexander Hamilton, to be mentioned at length hereinafter. The Government's brief relies particularly upon that part of Hamilton's declaration of American policy, in which he says:

> "No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation;"

and the further declaration of Hamilton:

> "The property of a foreigner placed in another country by permission of its laws may justly be regarded as a deposit of which the society is the trustee. How can it be reconciled with the idea of a trust to take the property from its owner, when he has personally given no cause for its deprivation"?

In explaining the Civil War Confiscation Acts, and pointing out that they were not acts authorizing the general confiscation of enemy property, the Government's brief in the *Chemical Foundation* case (p. 204) declares:

> "The Act of 1861 authorized the confiscation of all property belonging to individuals who were guilty of certain specified acts of disloyalty or of participation in the prosecution of the war by the Confederate States. The Act of 1862 authorized the confiscation only of property which was being used in support of the rebellion; and the Act of 1863 authorized the seizure only of property which had been abandoned by the own-

> ers. The purpose of all these acts *was to punish American citizens for acts of disloyalty*, and although they were later sustained on the doctrine of seizure of enemy property, *the legislation cannot be cited as a precedent for confiscation of enemy property during the war just ended.*"

The case of *Miller* v. *United States*, 11 Wall. 268 contains much *dictum* which is bad law. Without sufficient analysis it has been used by courts during the late war to sustain the power of confiscation. It was improperly invoked by the Court of Claims in this case, not only because it does *not* sustain the general power of confiscation—the case involved the Acts of 1861—but because the court expressly refrains from suggesting that the ships were confiscated. No one could seriously contend that they were. The Government's own contention that the Acts of 1861 and 1862 constitute no authority for the confiscation of enemy private property in a foreign war is confirmed by the statement of Mr. Hyde, until recently Solicitor for the Department of State (International Law, v. II, p. 238):

> "It is not believed that [the Acts of 1861 and 1862] in view of the nature of the conflict then existing, indicates legislative approval of the confiscation in a foreign war of the property of alien enemies within the national domain."

After quoting from several Supreme Court decisions deprecating and denying the legitimacy of confiscation, the Government's brief in the *Chemical Foundation* case proceeds (p. 206):

> "We have already shown that this doctrine (the immunity of private property from confiscation) was recognized by Congress at the time the Trading with the Enemy Act was adopted and that the Act was drafted and enacted for the purpose of carrying out this enlightened modern

> public policy, which may take over the custody and control of the property of the enemy during war *but does not confiscate it.*"

The Government's brief (pp. 206-208) then quotes from the addresses of President Wilson to prove that any thought of confiscation of private property was to him abhorrent.

At p. 574 of the Government's brief the thought is again expressed that "the policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the military zone of war," and the Government then affirms that Congress did not and did not purport to violate this policy in the late war. It is not to be doubted, after the examination of American policy and practice, hereinafter to be reviewed, that an identical immunity extends to private enemy merchant vessels found in port on the outbreak of war.

Had Congress not contemplated the normal procedure for compensating the owners of the seized ships, they could and would have incorporated a provision to that effect in the Joint Resolution. When Congress did not wish to commit itself to compensation, it had no difficulty in so expressing itself in other legislation of the war period. For example, Section 12 of the Trading with the Enemy Act of October 6, 1917 (40 Stats. at Large, 423) provides that

> "after the end of the war any claim of an enemy or of an ally of an enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury shall be settled as Congress shall direct."

The difference between this language and the language of the Joint Resolution under discussion inevitably raises the inference that in the one case it is intended

to postpone the question of restoration of the property or compensation for it until "after the end of the war" when the claims were to be settled "as Congress shall direct," whereas in the Joint Resolution there was no such contingency or eventuality provided for. In one case there was merely sequestration, in the other, expropriation. In the Joint Resolution payment was contemplated as a matter of law, and, as will be demonstrated hereinafter by an examination of the debates, the only serious doubt seems to have been whether the compensation should be immediate or whether the parties should be left to their subsequent remedies in the courts.

That Congress was well aware of what it was doing and that it intentionally avoided any inference of confiscation, is evident from the discussion, by the Committee, of the early case of *Brown* v. *United States*, 8 Cranch, 110. In that case, it will be recalled, Chief Justice Marshall stated that while there was a right (power) to confiscate enemy property found in port on the outbreak of war—which Congress had not exercised—nevertheless, he and a majority of the court deprecated the practice and held that in the United States such property could not be confiscated without special legislative enactment *ad hoc*, for by the Constitution the power to "make rules concerning captures on land and water" vests in Congress.

Although since 1854 the law has been practically uniform throughout the world, a practice to which the United States has firmly adhered, that ships in port on the outbreak of war have an immunity from confiscation, Congress in 1917 had before it and under consideration the case of *Brown* v. *United States*, and in full contemplation thereof expressly avoided any inference that their action was confiscatory, or that they were making a "capture" on land or water. On the contrary, they made it clear that they were merely

authorizing the legal expropriation or requisition of privately owned merchant ships and contemplated that a claim would be brought for compensation in judicial "proceedings," and undertook to aid those proceedings by providing for a valuation commission and board of survey whose findings were to be considered "as competent evidence in all proceedings on any claim for compensation." It would seem difficult more firmly and completely to negative the inference that confiscation was in the mind of Congress, or was exercised, but, on the contrary, it seems clear that the very opposite of confiscation, namely, compensation, was contemplated and anticipated by Congress.

(b) The statements of the members of the committee and members of Congress which reported out and debated the Joint Resolution:*

But if there were any doubt, after the reading of the Joint Resolution, as to what Congress actually intended, that doubt, it is believed, would be permanently removed by an examination of the debates in Congress, and particularly the declarations made by the Chairman of the committee which reported out the Joint Resolution now under discussion.

Mr. Alexander, the Chairman of the House Merchant Marine Committee which had this bill in charge, said in the House on May 7, 1917 in introducing the bill already passed by the Senate, that there was no doubt that compensation was due, but that it ought not to be paid to the German owners in 1917 while the war was still on. There seems to have been no doubt in the minds of the members of Congress that compensation

*There seem to be two editions of the Congressional Record of May 7, 1917; one edition carries the debates from page 1900 to 1983; the other begins at about page 1960 *et seq.*

was due, and they so construed section 2 of the Joint Resolution. There was a difference of opinion as to *when it was due;* immediately, as several members contended, or at the end of the war by proceedings in the Court of Claims, or by adjustments made between the two governments. It was never, however, contended by anyone, so far as can be found, that the Joint Resolution constituted a confiscation of the property to the United States, thus leaving out of account the private property interest involved in the taking. Here it may be said that the matter of the expropriated ships was not adjusted by the two Governments nor were any arrangements made with respect thereto. The municipal law of the United States must therefore take its course.

Mr. Alexander, Chairman of the House Merchant Marine Committee, said (*Cong. Rec.*, May 7, 1917, page 1903):

> "We could compensate the Hamburg-American and the North German Lloyd Steamship Companies for these ships; *if we pursue our policy in the future as in the past we will compensate these owners for these vessels,* but at this time, early in the war, and with conditions changing from day to day, the equities shifting, it will be time enough, in the view of the Senate and in the view of the administration and in the view of the Committee on the Merchant Marine and Fisheries, to adjust these equities after peace has been declared. * * * "

Mr. Alexander ended his remarks after submitting numerous authorities on the American policy and on international law with respect to the status of ships in port on the outbreak of war, by the statement (*Cong. Rec., Ibid.*, page 1909):

> "It should be evident to all mankind that our Government, in the conduct of the present war,

will be governed by those broad principles of humanity and justice that have given lustre to our flag."

Mr. Rowe, Congressman from New York, in the debate on House Joint Resolution 62 (*Cong. Rec., Ibid.*, page 1919) said:

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take the real estate in my State and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.
>
> "*There is no man in this House to-day that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will be paid.* We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government *before this war is closed.*"

Mr. Stafford of Wisconsin made several statements of law and policy which represented the considered views of a good many of his associates, and which constitute sound law at all times. Among other remarks, he said the following (*Cong. Rec., Ibid.*, page 1919):

> "I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships, but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships. * * *
>
> "And I make this claim, that if Germany accords to our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accord them reciprocal rights, then these foreign subjects, upon the

seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property. I shall not take up the time to call the attention of the committee to the clauses under the judicial code that authorize such procedure. In another body when this resolution was suddenly presented for consideration reference was made to the case of *United States against Russell*, Thirteenth Wallace, page 623, as justifying our action in appropriating these private vessels. I wish to read from that decision, which has been many times referred to approvingly in subsequent decisions of the Supreme Court, and to call attention to the principle which I am enunciating here, that if we confiscate this property for war's ends—and I claim that is the only justification, because of the need at the present time to assist our Government in this war in the transportation of munitions and troops—then we must recognize the rights of property, and the owners are entitled to be reimbursed by our Government.

* * *

"Undoubtedly we would have a right to confiscate them if they were public vessels of the enemy, but as these vessels are the private property of subjects of the alien country, we should in conscience reimburse them, just as under international law we are bounden to reimburse Germans or Austrians in this country in case the Government should have need to take for war purposes any of their private property. Why, no one claims that bonds, money, or any other property of foreigners domiciled in this country can be taken by the Government without the owners being compensated.

* * * * *

"So with these private vessels, though they are movable, nevertheless they are private personal property. They are the private property of these stockholders just as bonds owned by enemy aliens in this country are their private property; and if perchance they are destroyed by a submarine

attack of the enemy that does not destroy the rights of these alien owners to their rights of property, which are recognized in international law" (pp. 1919-1920).

After hearing Mr. Stafford, who contended that the ships could not be taken without payment of compensation, Mr. Bankhead interrupted to ask (*Cong. Rec., Ibid.*, page 1920):

> "I will ask the gentleman from Wisconsin if he can find in either one of the sections of the joint resolution as reported to the House a denial of the principle he is arguing for?"

Mr. Stafford then added (page 1920):

> "The bill provides, in section 2, for the means whereby the Secretary of the Navy may appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas, another member of the Committee, distinctly affirmed that the power then exercised was the power of eminent domain. He said among other things (*Cong. Rec., Ibid.*, page 1921):

> "*This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen,* and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

He added (page 1921):

> "Section 2 provides for a survey and estimate of the value of the ships taken over. It

does it in order that that survey might be held as *prima facie* evidence of the facts; that is, of the value of the ships when taken over. It does not undertake to decide the matter or manner of compensation now * * *.

"I want to say that, so far as our policy as a nation is concerned, from its foundation it has never been a policy of ruthless power. We have never intended, never desired, and never will desire to wrongfully take the property of citizens of any nation, even though we are at war with that nation. *It has been our policy that any property which comes rightfully within our jurisdiction will have all of the rights of its owner preserved,* and when this war is ended there will not be a German right which will be violated by the American people, and I believe I know this Congress well enough to know that it will never use its power to take from any man, German, Austrian, Englishman, Frenchman, or American, any right that justly belongs to him. * * *"

"It is a well-recognized fact that under the right of eminent domain the Government takes the things necessary for its defense" (p. 1922).

Mr. Small of North Carolina, in asserting the necessity of compensation, said (*Cong. Rec., Ibid.*, page 1922):

"I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but *at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time.* * * *

"Mr. Chairman, the President has said, and I take it it is the sentiment of every intelligent and just-minded citizen in our country, that *the private property of alien enemies within the United States shall be scrupulously respected and preserved.* These ships in large degree, if not altogether, are the property of residents or citizens of the Imperial German Government. Sim-

ply because this property consists of ships instead of money in bank or real estate located here, or buildings, or movable personal property, does not in my mind differentiate them so as to apply a rule of right to one and not to the other."

Mr. Edmunds, a leading member of the House from Pennsylvania, in pointing out that there was no intention to confiscate the property, but an intention to requisition it, leaving the payment of compensation open to the future, said (*Cong. Rec., Ibid.*, page 1923):

> "*I am sure there was no intention to confiscate this property.* It was simply left open for adjudication at an early date.
>
> • • • • •
>
> "We take the ships. We have arranged to leave the question of compensation open. The treaty is here. *Undoubtedly all those questions will be brought up when this case will be adjudicated in the Court of Claims, where they have a right to take it.*
>
> "In the case of *Wagner* v. *The Juanita*, Twenty-eighth Federal cases, page 382[illegible], the court reaffirming the principle stated by Chief Justice Marshall, said:
>
> > 'In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the court equally strong against the claim of the libellant; she is to all intents and purposes property as much *infra*-territorial, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States than the river upon whose waters she is now floating.'
>
> "Now, gentlemen, undoubtedly the committee, realizing that the Government needed these ships, has taken the best course that it is possible to devise to take possession of them at this time, and has left the question entirely as to how they were to be settled for open for the future."

Thus it was Mr. Edmunds' view, and, it appears, that of the House generally, that the ships were being taken over under a theory of requisition, and the question was not as to *whether* they would be paid for, but as to *when* and *how*. The private title was always recognized, and there was no thought of confiscation.

After citing the resolution of Congress on April 28, 1904 (*infra*), which proclaimed the time-honored American policy (going much further even than the established policy of exempting from seizure and condemnation ships in port), of exempting from capture *at sea* all private ships and other property not contraband, Mr. Edmunds said (*Cong. Rec., Ibid.*, page 1923):

> "Now, gentlemen, you will see that the House and the Congress has at all times stood *for fair compensation for anything it has taken belonging to anybody else, whether belonging to our own citizens or to foreign citizens.* I think we can afford to pass this resolution and *leave it to the court to pass upon in due time what we are to pay for these ships.*"

Mr. Slayden of Texas, one of the wisest members of the House, a man of sound judgment and integrity, and long a member of the House Committee on Foreign Affairs, in stating the purpose of the Treaty with Germany, which he feared the House might violate by not providing for immediate compensation, said among other things (*Cong. Rec., Ibid.*, pages 1923-1924):

> "The purpose of Article XXIII was to mitigate the horrors of war and to compel respect for the rights of property of private citizens and to secure decent treatment for individuals forced to reside in an enemy country.
>
> "I am convinced that section 2 of this resolution designedly recognizes that obligation in the words that permit a board of survey to be appointed to value this property that we are about to appropriate to our military use.

"It is a recognition of the fact that the obligations of the three treaties to which I have referred—of 1785, 1799, and 1828—still bear on us, are still to be respected in principle; and I am delighted to know that the chairman of the committee (Mr. Alexander) was wise enough *to have those obligations recognized in the way he did, and incorporated in the resolution itself.*"

Mr. Slayden added a statement which will always be deemed to reflect credit upon the man who uttered it, because it conserves the traditions of this country, traditions which no court can disregard without impairing the integrity of the United States. He said in concluding his address (page 1924):

"We can not build up civilization, we can not provide anything like a reasonable scheme for the maintenance of peace between the governments of the world unless we do respect that principle; and I would like to have it known to the whole world that it is the opinion of the American Congress, without additional legislation being necessary, that private property rights that were undertaken to be cared for in the three treaties I have mentioned are to be respected, and that the United States, at least, is going to conduct its war upon the basis of justice to private citizens; and that after the war is over we stand willing actually, in spirit and in fact, to help the world reestablish itself on a basis of sanity, and meantime we are going to keep the faith to which we are plighted.

"Mr. Chairman, the fact that treaties have been broken and that people who were our friends have now for the time being become our enemies, ought not to cause us to set aside all the decent and well-conceived laws of the past for the recognition of their rights and the governing and protection of personally innocent and unoffending individuals. The most distressing feature of the situation in this country is the intolerant spirit shown by some of our people. Regardless of

treaties I have heard a demand that we should take the property of Germans in the United States. Because a man has the temerity to stand up and plead for justice to citizens of an enemy country, who unfortunately happen to be here, he is frequently denounced as pro-German; because he merely stands for reason, for common sense, and for recognition of the principles that this Government has stood for from the beginning, and which I am proud to say I believe it will stand for until the end. These intolerant people, these people who believe it to be the duty of every citizen to hate the individuals of another country with which his is engaged in war, have been manifesting a hostility that is not creditable to them as men, and certainly if shared in by this Government as a political entity will reflect no credit upon it."

Mr. Hadley of Washington, in speaking of section 2 of the Joint Resolution, states the purposes of the survey and of the evidence that it was to collect. He says (*Cong. Rec., Ibid.*, page 1924):

> "It is to be preserved, and *to be submitted in any court of competent jurisdiction that may deal with that subject.* That is expressly provided by the resolution."

Mr. Hadley added (page 1924):

> "* * * it * * * will show the resolution and *purpose on the part of the Government to recognize the claim for damages* in case the party has a right to it. * * *
>
> "I hope gentlemen considering the resolution will not lose sight of the fact that, while the committee did not attempt to provide the machinery for the final solution and determination of the matter, *it did not ignore the fact that compensation might be had*" (p. 1925).

Mr. Campbell of Kansas, a veteran member of the House, in insisting that compensation ought to be paid

for the ships seized, and insisting that such compensation would be given—though at the end of the war—said (*Cong. Rec., Ibid.*, page 1925):

> "I do not agree that any settlement should be made at this time with the owners of these ships *but the owners of these ships need have no fear; they need not look forward to a time when the war shall have been ended to any difficulty they will have in getting justice from the United States.* As to whether or not these ships shall become the victims of submarines at the hands of the German Government raises a question that will no doubt enter into the settlement of the matter of the payment for these ships; but the Government of the United States has always maintained its position of adhering with the strictest account to every treaty that it has entered into and to every obligation that it has assumed or that is thrust upon it, and that will be true with respect to these ships and to every incident growing out of this war as it has with respect to every other. The owners of the ships and the German Government may well look back to the action of the United States at the termination of the Spanish-American War, when this Government did more than was really expected of it by the vanquished.
>
> * * * * *
>
> "That is all I had in mind to say, and I would not have stated it if it had not been that it has seemed to me there has been some anxiety here for fear that the Government of the United States would take advantage of its power in the premises and in the final conclusion not do justice by the owners of any property it may seize for war purposes."

Mr. Lenroot, in rejecting an inference from his speech that possibly compensation might not have to be paid, says (*Cong. Rec., Ibid.*, page 1929):

> "I do not say for a moment that we ought not to compensate the owners of these ships."

Mr. Fess of Ohio, in pointing out that the second section of the act definitely suggests that the theory of the seizure is one of requisition and not confiscation, says (*Cong. Rec., Ibid.*, page 1930):

> "*But the second section suggests that it is to be requisitioned,* or at least it lays the grounds for it, since it there provides for a board of survey to ascertain the values of these vessels. It does not specify just why that is done, but all of us understand that in case it is to be adjudicated on the question of value, *this Government by this provision shows clearly its intention not to take any advantage of the owners of these vessels.*"

Mr. McFadden, in pointing out that the ships were private ships and that the United States could not do otherwise than pay for them, says (*Cong. Rec., Ibid.*, page 1932):

> "If, on the other hand, the real ownership of these boats is not vested in the German Government, I am interested just to the extent to see that confiscation of private property is not had by this Government without some basis of settlement being provided for eventually. I do not say at this time, but eventually, but believe the law should be made very specific now; and in that connection I want to quote a statement which was made by the State Department, with the authority of the President, on February 8, 1917, in which it stated:
>
> > 'The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. *It will scrupulously respect all private rights of its own citizens and the subjects of foreign States.*'

"Then I also want to quote from the President's message to this Congress on April 2, in which he said this:

> 'Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.
>
> 'It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus.' "

Mr. McFadden added:

* * * * *

"* * * but, however grave the situation, shipping that came to our ports in the legitimate prosecution of ocean traffic, the property of individuals and companies, should not be seized *without rendering at the proper time just compensation therefor.*

* * * * *

"* * * but, on the other hand, if it is finally determined that these boats are the property of individual citizens of Germany, after the war is over that prompt and full settlement will be provided for to the individual citizen."

On April 30, 1917, while the Joint Resolution of May 12, 1917, was pending, and because of his impatience at the failure to report it out more quickly, Senator Knox (*Cong. Rec., Ibid.*, page 1570—other edition page 1510) presented a resolution reading:

> "*Resolved*, That the President of the United States be, and he is hereby, requested to at once requisition all vessels of alien enemies of the United States in the ports and waters of the

> United States or elsewhere found, and to use the same in the prosecution of the war * * * in such trade or manner as will, in his judgment, best subserve the interest of the United States."

Mr. Knox was informed by Mr. Overman, a member of the Judiciary Committee, that the bill then about to be reported out was a bill to the same effect, and Mr. Knox stated that he introduced his bill in order to bring about speed.

The Court of Claims in its opinion (R. 11), utterly misconceives the purpose of Senator Knox's bill. There is not the slightest inference that Congress did not intend to authorize suits in the Court of Claims. On the contrary, there is overwhelming evidence that they did. But the acts they authorized, and the action taken thereunder, created those legal relations which gave the Court of Claims jurisdiction under the Tucker Act.

Senator Knox, ex-Secretary of State, in showing that the ships were not being confiscated, which, in his judgment, would require a prize court, stated (*Cong. Rec., Ibid.*, page 1571):

> "Prize courts are created not to adjudicate upon vessels that have been seized *by requisition or other process, but are created for the purpose of passing upon captured vessels;* and in the event of a seizure by such a method as proposed by this resolution, just as the Senator from Massachusetts suggested a moment ago, compensation awaits the event of the war and is determined by the treaty of peace."

It will be shown hereafter that the Treaty of Berlin, which constitutes the treaty of peace between the United States and Germany, contains no denial of the principle of American public law that the private ships taken for the public use under the Joint Resolution of May 12, 1917, shall be compensated for. The Treaty of Versailles, to which the United States is not a party, did

make provision for the German private ships taken over by Great Britain and other Allied governments, but from these provisions the United States has expressly excluded itself.

The intent of the House and the Senate to observe the rules of international law in the appropriation of the German ships is clear throughout the entire debate. Mr. Knox (page 1573), after pointing out that the sixth Hague convention enabled the belligerents to detain an enemy merchant ship and restore it at the end of the war or requisition it and pay for it, indicated that it was the latter of these alternatives that we were acting upon, and he seeks to justify it by showing that this was exactly what the British purported to be doing. He says (page 1573):

> "In this connection I want to call your attention to what Great Britain has done in this situation, finding, as we found, a large number of German merchant vessels in her ports. In this connection it is to be noted that on the 10th of February, 1915, the British secretary of state for foreign affairs adddressed the American ambassador, and after referring to the act of the German Government in destroying British shipping and the consequent need for vessels stated what I now read from the British Secretary's language:
>
> > 'To ease the situation His Majesty's Government are resorting to the power of requisitioning which is given by the convention (Hague Convention, No. VI), so that these ships may again be placed in active service.'
>
> "So our great maritime ally, Great Britain, rather than take over the title to these vessels subject to paying compensation after the war, requisitioned the vessels, which leaves Great Britain and would leave us in this position, that at the conclusion of the war we would have the option to say we have taken the use of your

vessels during the war, and all we are responsible for is the value of that use, less the wear and tear, depreciation, and damage that they have sustained. Necessarily, if the Senate should adopt this theory of acquiring the use of these vessels, it would not be necessary to make all these provisions about the ascertainment of liens, the ascertainment of the division of the title, or anything else, because, they being taken as the vessels of an alien enemy, there would be no method of charging, no machinery which was created, and no possible way of adjustment until the conclusion of the war."

By taking *the title* of the ships and ascertaining their value at the time of acquisition of title, Senator Knox thus conceived that we were avoiding the questions which would have arisen had we only taken *the use* of the ships.

Senator Lewis of Illinois, in calling attention to the Treaty with Germany which maintained the sanctity of private property, insisted that the resolution should accord with this time-honored tradition of the United States and with the provision of the Treaty, and called attention to the fact that the Joint Resolution provided merely a different method of compensation from that of immediate payment; but that compensation was intended and contemplated at a future time is hardly to be doubted from a reading of the debates and speeches made by the members of the committee that reported the bill to the floor of the House and the Senate.

The Joint Resolution itself, of course, as already observed, in providing that a board of survey should estimate the value of the ships, and that "these findings shall be considered as competent evidence in all proceedings on any claim for compensation," definitely implies that the ships were not taken on any theory of confiscation, but that future compensation was contemplated. While it does not provide the method of compensation, it leaves this to be applied according to the general principles of American constitutional law.

(c) The utterances of the executive officers of the United States in the consideration of this question.

Were further evidence required that the United States, in taking possession and title of the German ships in our harbors on the outbreak of the war, was exercising its power of requisitioning private property for the public use under eminent domain and not exercising the alleged power of confiscation, it would be found, it is believed, in the statements of executive officers of the United States, both contemporaneous and subsequently in office.

That it was an established principle of American policy not to confiscate private enemy ships in our ports on the outbreak of war, and that we had been the foremost nation in the world to advocate the general adoption of the even more far-reaching practice of giving immunity to private property at sea generally, is a well known fact. The history of the American policy will be outlined hereafter.

That it was the intention of the United States not to reverse its enlightened past by reverting to barbaric practices of the Middle Ages, never adopted or espoused by the United States, seems also evident. That, on the contrary, it was the intention of the United States to adhere to its traditional enlightened policy in dealing with private property, including ships, may be deduced from the statements of President Wilson on several occasions. In the present connection it may not be improper to quote from the public announcement of the State Department, issued with the authority of the President on February 8, 1917, in which it is declared:

> "The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law

of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and the subjects of foreign States."

In his message to Congress of April 2, 1917, the President made an express declaration that we would adhere to the high standards of public morality and fair dealing which had marked our operations as belligerents in the past. It must surely be assumed that he did not contemplate that we would at one stroke overturn the time-honored traditions of the Nation. In that address he stated:

> "We have no selfish ends to serve * * *. The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. * * *
>
> "Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents, without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.
>
> "It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus."

Franklin K. Lane, Secretary of the Interior in the administration of President Wilson, and one of his most trusted advisors, in writing to the late Frank I. Cobb, editor of the New York *World*, on April 12, 1917, when the policy of the Joint Resolution of May 12, 1917 was under discussion in the Cabinet, said:

> "I am in favor of taking all the German ships under requisition, paying for their use eventually, but this is a matter of months." (Letters of Franklin K. Lane, 1922, page 245.)

On April 15, 1917, Secretary Lane wrote to his brother George W. Lane, as follows:

> "We, of course, are going to press into service at once the German and Austrian ships, such of them as can be repaired and will be of use in the freight business, but *we will not confiscate* them; we will deal with them exactly as we deal with American ships, *paying at the end of the war whatever their services were worth.* This spirit of fairness is to animate us throughout the war." (*Ibid.*, page 246.)

That this proposal of Secretary Lane reflects the traditional policy of the United States and was incorporated in the Joint Resolution of May 12, 1917, seems evident. It was framed with full knowledge of the policy of the United States with respect to the subject of enemy private ships in port on the outbreak of war, a subject to which an entire Hague convention had been devoted in 1907, and on which the United States had taken a very definite and enlightened position, to be referred to presently.

There is not a shred of evidence, it is believed, to contradict the conclusion that Congress, in passing the Joint Resolution, acted upon the premises laid down by Secretary Lane, and believed itself to be following out and acting in conformity with the traditional policy of the United States.

It is interesting to observe that the view that the resolution of May 12, 1917 contemplates the payment of compensation is entertained by the Department of State. The Department, in a letter written to Senator Lodge under date of December 8, 1920, over the signature of Assistant Secretary Van S. Merle-Smith (printed on page 4 of the hearing before the Committee on Foreign Relations of the United States Senate, 66th Congress, 3rd Session, on Senate Bill 4445 to provide for the return of the steamship *Martha Washington* and pay compensation for her use), expressly stated:

> "The Joint Resolution of May 12, 1917, which authorized the seizure of the vessel, contemplates the payment of compensation."

This letter, with the important statement just mentioned, was used by the Honorable Charles E. Hughes, late Secretary of State, in his argument before the House Committee on Merchant Marine and Fisheries (66th Congress, 3rd Session) under date of December 15, 1920, concerning the return of the steamship *Martha Washington* to its owners, and compensation for its use. On page 17 of the hearings, in a colloquy between Mr. Hardy of Texas, a member of the Committee, and Mr. Hughes, the following observations may be noted:

> "Mr. Hardy: As I understand it, under international law the private property, and justly so of a private citizen of a country which may get into war with us, is really sacred?
> "Mr. Hughes: And ought to be."

It would seem from these statements made by high government officials, that they well understood that the act of taking possession and title to the private merchant ships here in question was an act of requisition in accordance with American policy and tradition and international law, and was, therefore, the very opposite of an act of confiscation.

(d) The policy of the United States Government from the beginnings of its history as disclosed by its laws, the declarations of its statesmen and publicists:

From the beginning of the history of the United States we have adopted the policy not only of giving the most liberal treatment to merchant ships found in our ports on the outbreak of the war, but we have been the leading nation to assert the wider doctrine that private property at sea shall be exempt from capture.

In 1798, relations with the French Republic became so strained that war seemed unavoidable and imminent. The legislation usual to such a condition of affairs was passed, although, as a matter of fact, no hostilities ensued. On July 6th of that year, "An Act respecting Alien Enemies" (1 Stat. at Large 577) was passed by Congress, Section 1 of which reads in part:

> "Provided that aliens resident within the United States who shall become liable as enemies in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, disposal and removal, of their goods and effects, and for their departure the full time which is, or shall be stipulated by any treaty, where any shall have been in existence between the United States and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects; and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."

Again in 1812, in the famous case of *Brown* v. *U. S.*, 8 Cranch. 110, despite the opinion of the court that from the point of view of international law the power existed to confiscate enemy property found in one's ports at the outbreak of war—a rule which since 1854 has become obsolete—and despite the fact that our enemies were exercising this power to condemn our property, nevertheless, Chief Justice Marshall and a majority of the court deprecated the practice and held that in the United States, such property could not be confiscated without a special legislative enactment *ad hoc*, for by the Constitution the power to "make rules concerning captures on land and water" vests in Congress.

Yet, notwithstanding this decision, Congress, in 1846, in declaring the existence of a state of war with the Republic of Mexico (9 Stats. at Large, p. 9), again omitted any specific reference to the treatment of enemy property, and the United States District Court, following the *Brown* case, again refused to condemn an enemy vessel found in an American port. (*The Juanita*, Newberry, p. 352). In that case it was expressly laid down that such private property was under the protection of American law.

In 1861, although the war then being initiated was a civil war, and the insurrectionists were considered rebels, the United States expressly stipulated that the ships of these rebellious citizens be given fifteen days to make good their withdrawal from the ports of the loyal sections of the country (Act of July 10, 1861, 12 Stats. at Large 257).

So, in 1898, upon the occasion of the war with Spain, the President by proclamation specifically granted a period of immunity of 30 days to hostile vessels overtaken in port by the outbreak of war. Not only did this indulgence far exceed that granted by the enemy, but its liberality is remarkable among all instance of "days of grace." (See the *Buena Ventura*, 175 U. S. 384.)

Perhaps the most exhaustive declaration of American policy with respect to enemy ships in port on the outbreak of war is to be found in the position taken by the American delegation to the Second Hague Conference in 1907 with repect to the Sixth Hague Convention, which was designed to insure immunity from confiscation to enemy ships in port on the outbreak of war.

The Sixth Hague Convention, which was adopted by most of the powers of Europe as a rule of international law, provided in Articles 1 and 2:

"ARTICLE I.

"When a merchant ship belonging to one of the belligerent powers is at the commencement of

hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

"ARTICLE 2.

"A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, *can not be confiscated*.

"The belligerent may duly detain it, without payment of compensation, but subject to the obligation of restoring it after the war *or requisition it on payment of compensation*." (Foreign Relations 1907, 1248.)

The American delegation did not sign this convention (Foreign Relations 1907, pp. 1158-60), *because it did not go far enough*. They desired to have the *positive rule of law* confirmed, which the American practice, in their view, had established, that there was an absolutely binding obligation (and not merely a privilege) on every maritime power under all circumstances not to confiscate merchant ships found in port on the outbreak of war, and to give them the same liberal treatment that our traditional policy had established. The report of the American delegation in justification of their refusal to sign the Hague convention because it did not go far enough, is as follows (Foreign Relations 1907, p. 1158):

"The uninterrupted practice of belligerent powers since the outbreak of the Crimean War has been to allow enemy merchant vessels in

their ports at the outbreak of hostilities to depart on their return voyages. The same privilege has been accorded to enemy merchant vessels which sailed before the outbreak of hostilities to enter and depart from a belligerent port without molestation on the homeward voyage. *It was therefore the view of the American delegation that the privilege had acquired such international force as to place it in the category of obligations.* Such, indeed, was the view of a majority of the conference; but as the delegation of Great Britain adhered to the opinion that such free entry and departure *was a matter of grace or favor*, and not one of strict right, the articles regard it as a delay by way of favor and refer to the practice as desirable.

"In support of the American view, the case of the *Buena Ventura* is in point. This case was decided in 1899, and in his opinion Justice Peckham says:

> 'It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out would, *in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive*, it is necessary when his proclamation has been issued which lays down rules for treatment of merchant vessels *to put upon the words used therein the most liberal and extensive interpretation of which they are capable;* and where there are two or more interpretations which possibly might be put upon the language, *the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.*
>
> 'This is the doctrine of the English courts, as exemplified in the *Phoenix* (Spink's Prize Cases, 1, 5) and the *Argo* (Id., p. 52). It is the doctrine which this court believes to be proper and correct. The *Buena Ventura*' (175 U. S., 388).

"At the first reading, the convention seems to confer a privilege upon enemy ships at the outbreak of war. Free entry and departure are provided for, ships are not to be molested on their return voyages, *and a general immunity from capture is granted to vessels from their last port of departure, whether hostile or neutral.* But all these immunities are conditioned upon ignorance of the existence of hosilties on the part of the ship. *This condition forms no part of the existing practice, and it was the opinion of the delegation that it substantially neutralized the apparent benefits of the treaty* and puts merchant shipping in a much less favorable situation than is accorded to it by the international practice of the last 50 years.

* * * * *

"The convention also presents an undesirable alternative in the treatment of enemy merchant ships, in that it provides that in certain cases they may be seized 'subject to restoration after the war without indemnity' or to 'immediate requisition with indemnity.' As merchant marine commerce is carried on it is obvious that the condition of the cargo which is detained in indifferent or inefficient custodianship during the ordinary duration of war would approach confiscation. It would also be substantially impossible to make such a risk the subject of a practicable contract of insurance.

"The foregoing convention was not signed by the delegation, and its acceptance as a conventional obligation is not recommended."

The American official policy in this matter is reflected in the provisions of the United States Naval Code of 1900, in which it is provided that merchant ships in port on the outbreak of war "shall be allowed thirty days after war has been begun" to depart from the United States, free from molestation, detention or capture. The Naval Code provides, article 15:

"Merchant vessels of the enemy that have sailed from a port within the jurisdiction of the United States, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.

"*Merchant vessels of the enemy, in ports within the jurisdiction of the United States at the outbreak of war, shall be allowed thirty days after the war has begun to load their cargoes and depart, and shall thereafter be permitted to proceed to their destination,* unless they are engaged in carrying contraband of war or are in the military service of the enemy."

With the American practice in mind, Mr. Hyde, lately Solicitor for the Department of State, declares (*International Law*, v. II, p. 522):

"Provision for the detention, or requisition on compensation, of enemy vessels in port, in lieu of confiscation, is a mark of respect for private property which should enjoy universal approval. That respect is not lessened when a detained ship is either appropriated or destroyed, *provided the owner is reimbursed for what he has lost in consequence of such action.*"

With respect to the wider doctrine of the immunity from capture of private property *at sea*, the United States has established a traditional policy which *a fortiori* evidences the fact that in taking over the ships *in our ports* at the outbreak of the war, we did nothing but requisition them, a theory which inevitably contemplates compensation.

As early as 1783, four years before the adoption of the Constitution of the United States, Benjamin Franklin had proposed the insertion in the first treaty with Great Britain of a provision permitting unarmed vessels employed in commerce "to pass freely unmolested." (See Address of Mr. Choate at Second Hague Peace Confer-

ence, Deuxième Conférence, Actes et Documents III, 768).

In 1785, practically these exact words were embodied in the treaty with Prussia, negotiated by Franklin, Jefferson and John Adams (Article 23, Malloy's Treaties, Conventions, etc., v. II, 1484). In 1823 President Monroe, in his Annual Message to Congress said that our Ministers in France, Russia and Great Britain had been instructed to urge the immunity of private property of an enemy upon the seas as "a permanent and invariable rule in all future maritime wars." (*Annual Register*, 1823, p. 1852). In 1826, the United States delegates to the Panama Conference received similar instructions (see Address of Mr. Choate, cited *supra*). When the United States was invited to give its adhesion to the Declaration of Paris in 1856, it declined on the ground that the declaration was too restricted in that it failed to include the exemption of enemies' ships as well as their goods in neutral vessels. (See Correspondence between U. S. and Powers represented in the Congress of Paris, pp. 11, 12, 16.) Such an exemption was contained in a treaty negotiated between the United States and Italy in 1871. (Malloy's Treaties, Conventions, etc., v. I, 969, 975.)

President McKinley in 1898, and President Roosevelt in 1903, each brought the matter to the attention of Congress, with the result that, on the 28th day of April, 1904, Congress adopted the following Resolution:

> "That it is the sense of the Congress that it is desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers with a view to incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."

In the meantime the United States delegates to the First Peace Conference at the Hague in 1899 received the following instructions from Mr. John Hay, Secretary of State:

> "Since the Conference has its chief reason of existence in the heavy burdens and cruel waste of war, which nowhere affect innocent private persons more severely or unjustly than in the damage done to peaceable trade and commerce especially at sea, the question of exempting private property from destruction or capture on the high seas would seem to be a timely one for consideration.
>
> "As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the Conference, the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent powers, which such property already enjoys on land, as worthy of being incorporated in the permanent law of civilized nations."

(Instructions and Reports of U. S. Delegates to Hague Peace Conference (Scott) p. 9.)

The delegates had difficulty in bringing this proposal before the Conference, but finally did so, and in its sixth Resolution:

> "The conference expresses the wish that a proposition having for its object the decree of immunity of private property in war on the high seas should be referred for examination to another conference."

In conformity with this 'wish" the American delegates in 1907 again urged upon the Conference the adoption of the proposition in the following terms:

> "The private property of all citizens or subjects of the signatory powers, with the exception

> of contraband of war, shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers."

(Deuxième Conférence. Actes et Documents III, 766. See also General Report of the Fourth Commission to the Hague Conference, *Ibid.*, I, 245-249.)

While the United States has not succeeded in obtaining adherence to its enlightened views with respect to the immunity of private property *at sea*, the principle that ships in port are exempt from capture and can only be captured after the grant of days of grace for departure, is adopted by practically every maritime nation, and by the uniformity of the custom the practice must be regarded as a rule of international law.

When Mr. Choate addressed the second Hague conference in 1907, in urging upon the conference the adoption of the American principle, he stated that "to despoil innocent and unoffending merchants who are taking no part in the war, savors of the savagery of ancient war." (Acts and Documents of the Second Hague Conference, Vol. 3, p. 774.)

On the outbreak of the recent war, France and Germany, France and Austria, and Great Britain and Austria, as well as most of the smaller nations, all found it mutually possible to grant "days of grace," and the failure of the arrangement between Great Britain and Germany was only due to a delayed telegram and resulted merely in the "detention" of German vessels in British ports, without a thought of confiscation. It can hardly therefore be supposed that the United States, in taking "possession and title" to the German ships in our harbors, was exercising the power of confiscation. (See on

this subject, the essay of Eleanor Wyllys Allen, Enemy Ships in Port on the Outbreak of War, Carnegie Endowment 1921, to which the writer is indebted for much of the material in this section.)

But that the policy and traditions of the United States with respect to private enemy property of all kinds within the jurisdiction of the United States is established beyond question or doubt, is evidenced by the Government's own brief in the case of *United States* v. *Chemical Foundation*, pages 188 to 209, to which reference has already been made. The Government has itself made it unmistakably clear that the United States has always opposed confiscation of enemy private property within the jurisdiction of the United States in any form. To seek to assert the contrary, by snatches from *dicta* as to the *physical power* of the United States to confiscate, if it saw fit, is neither consistent nor material. The fact is that this Government has from the beginning of its history vigorously opposed confiscation, and in the Resolution of May 12, 1917, Congress clearly evidenced the intention not to confiscate, but on the contrary, to provide for compensation. The Government's brief in the Court of Claims in C-576, p. 21, is correct in saying that "compensation and confiscation are wholly inconsistent, and there would be no confiscation if compensation is provided."

As early as 1783 and 1794, we had occasion to assume a position on this subject, and to our national credit it was adopted with but little hesitation. During the Revolutionary War, several states of the United States had endeavored to confiscate the private property and debts of British subjects. By Treaty of 1783, it was agreed that these British subjects were to be restored to their rights. The states proving unable or unwilling to make this restoration, the federal government under the Treaty of 1794 paid to Great Britain 600,000 pounds sterling because of its inability

to enforce upon the states compliance with the Treaty of 1783.

Alexander Hamilton, in commenting in his Camillus Letters XVIII on the Tenth Article of the Jay Treaty, said in part:

> "No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which in an authorized intercourse in time of peace has been confided to the faith of our government and laws, on account of controversies between nation and nation. In my view every moral and every political sense unite to consign it to execration."

The legal, moral and practical justifications for the sancitity of the private property of foreigners even in case of war were elaborated by Hamilton in his Camillus Letters XIX, as follows:

> "The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.
>
> "There is no parity between the case of the persons and goods of enemies found in our own country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice

to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property, which during peace serves to augment the resources and nourish the prosperity of a state?

"*The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?*"

Ever since 1783, the position of the United States has been unalterable, namely, that private property on land is inviolable in time of peace or war, and our Treaty with Prussia, if Treaty were needed, was designed to insure adherence to the principle. As is well known, we have even gone so far as to advocate the immunity from capture of private property at sea, and by the weight of our influence, have secured considerable support for this proposal. If we were now to revert to the middle age practice, now clearly violative of international law, of confiscating private property, which would be the inevitable result of failing to pay for these vessels, we would be stultifying our national professions from the beginnings of our history.

As early as 1796, in the case of *Ware* v. *Hylton*, 3 Dallas 199, the Supreme Court of the United States had occasion to express itself on the policy of confiscation of private property. Justice Patterson in that case pointed out that even at that date the rule was considered "as a relic of barbarism" * * * "it ought not to have existed among any nations and perhaps is generally exploded at the present day in Europe." He added, speaking of confiscation, "the gain is at most temporary and inconsiderable; whereas the injury is certain and incalculable and the ignominy great and lasting." Justice Wilson, at page 281, remarks that "the practice of confiscation has long been considered disreputable."

Chief Justice Marshall in the famous case of *Brown* v. *United States* (1814), 8 Cranch 122, not altogether removed from the influence of the eighteenth century and of the fact that he had been the attorney for Hylton in *Ware* v. *Hylton*, and therefore had to defend the validity of a title derived through an act of confiscation of the State of Virginia, made the following statement:

> "Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right but cannot impair the right itself. * * * Although in practice vessels with their cargoes found in port at the declaration of war may have been seized, *it is not believed that modern usage would sanction the seizure of the goods of an enemy on land which were acquired in peace in the course of trade.* Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war."

He added that no nation could now (1814) exercise such a right "without obloquy."

It will not, however, be difficult to show that if the exercise of a right is "affected," it is hardly possible to speak of the right itself as legal, for if the right cannot be lawfully exercised, it is no right at all. No one has pointed this out more clearly than John Bassett Moore, the greatest living authority on international law, whose views as to the propriety of confiscation have not been left doubtful. In discussing Marshall's professed distinction between a right and the exercise of a right, he has made the following remarks:

> "Referring to the practice of nations and the writings of publicists, he declared that, according to 'the modern rule, tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated'; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, and that the 'mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. *The supposition that usage may render unlawful the exercise of a right, but can not impair the right itself, is at variance with sound theory.* Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity *from the fact that the practices out of which it grew were ancient and barbarous.* We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the

> true theory of the law to an opinion of the same great judge, delivered twenty years later, in which *he denied the right of the conqueror to confiscate private property,* on the ground that it would violate 'the modern usage of nations *which has become law.*' (*United States* v. *Percheman,* 7 Peters, 51.)" (Italics ours.) (Moore's Digest of International Law, VII, 312-313.)

Chief Justice Marshall himself, whatever hesitation he may have experienced in 1814 in denouncing the illegality of confiscation, had no doubt on the subject in 1833 when he had occasion to decide the case of *United States* v. *Percheman,* 7 Peters 51. In that case he said:

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. *The modern usage of nations, which has become law, would be violated;* that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. * * * If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

Expressions by Mr. Justice Strong in the case of *Miller* v. *the United States,* 11 Wall 268, dealing with the Confiscation Acts passed by Congress in 1861 and 1862 as a punishment for treason of adherents to the Confederate cause, seek to justify the acts in part on the ground that they might have been justifiable against public enemies. Congress, however, passed the acts not as confiscations of the property of public enemies, but as penalties for treason, and reference has already been made to the Government's own explanation of these Civil War Acts in its brief in the *Chemical Foundation*

case. The unsoundness of using the Confiscation Acts of 1861 and 1862 as precedents or analogies for the confiscatory treatment of the private property of foreign enemies in a foreign war is clearly pointed out by Mr. Hyde in his recent work on International Law (v. II, 238). Mr. Justice Strong paid practically no attention to the development of the law as outlined above in the decisions of Chief Justice Marshall. In that same case Justice Field admitted that Congress under its war powers was bound by international law, and it is not now to be doubted that the confiscation of private property is a violation of international law. Justice Field at page 316 of that case said:

> "The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe *subject to the condition that they are within the laws of nations.*"

It has already been emphasized that the vessels in this case were not "captured" at all, but taken over under eminent domain.

The principle that private property is immune and inviolable in time of war has been laid down in other cases, subquent to Marshall's time. For example, in *Hanger* v. *Abbott* (1876) 6 Wallace 532, the court characterized the practice as "condemned by the enlightened conscience and judgment of modern times."

The quotation from Wheaton on page 18 of the Government's brief in the Court of Claims in C-576 deals with property "captured from the enemy," which is not the case with the requisitioned ships here in question. The Government might, with more appropriateness, have cited the extract from Wheaton, 5th Ed., pp. 531-532, which the Government itself cited to the Court in the *Chemical Foundation* suit (Government's brief, p. 575) and the validity of which the Court, in its decision, in no way

denied. Speaking of "the modern usage of nations, which had acquired the force of law," Wheaton says: "Private property also came to be regarded as immune from confiscation with the exception of such as might become booty, in special cases, *when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory.*" It will be noted that the exception does not cover private property *within the jurisdiction*, which is institutionally immune from confiscation. The Government cites in support of the principles of immunity, Vattel's Law of Nations, Chitty's Ed., 1863, p. 318, Taylor, Public International Law, 1901, v. I, p. 547 and Wilson, Int. Law, Sec. 117, p. 283 and then quotes Article 47 of the Hague Convention of 1907 on the laws and customs of war, reading:

> "Family honor and rights, the lives of persons *and private property*, as well as religious convictions and practice, must be respected. *Private property cannot be confiscated.*"

The immunity of private property has been regarded as one of the most settled rules of international law. The United States helped to establish the enlightened practice and should be the last country to abandon it and its own traditions. It cannot do so without placing an incalculable blot on the national reputation and without impairing the integrity of all foreign investments hereafter, both of foreigners in the United States and of American citizens abroad. It need hardly be added that practically every writer of authority on international law has regarded the inviolability of private property as a settled rule of law, and therefore binding on the United States. To quote from only one authority, the greatest of all, John Bassett Moore, in Vol. 7, page 306 of his monumental Digest of International Law, shows that whatever may

once have been the law, the confiscation of private property, like the enslavement or killing of women and children, is no longer the law. He says:

> "It is true that in certain early writers who reiterated the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies, and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed."

Judge Moore adds (p. 308) after reviewing the authorities:

> "Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> 'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters *after* the commencement of war, may be said to enjoy a practical immunity from confiscation.'"

Mr. Hyde, the latest writer on the subject, adds that "it is unlikely that the United States would at the present time pursue a different course" (II, 239).

Only recently, the late Secretary of State, Mr. Hughes, gave expression to the national policy of abhorrence of confiscation, a policy which he deemed of universal validity and application. In his address at Philadelphia, Nov. 30, 1923, Mr. Hughes declared:

"States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws.

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful cooperation is possible.

"Each State may have its code of laws in accordance with its conception of domestic policy, but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

(e) The Prevailing Rules of International Law.

The prevailing rule of international law, which is even less rigorous than the rule which the United States by policy and uniform practice had made binding upon itself, forbids the confiscation of ships in port on the outbreak of war.

Down to the Crimean War, when Turkey advocated and adopted as a principle the rule that merchant vessels owned by subjects of the enemy state should be permitted to depart unmolested and should not be confiscated, it had been more or less common practice to lay an embargo on such vessels and to condemn them, as captured enemy property, in prize courts. The practice which Turkey initiated as a principle and which conformed to the practice of the United States from the beginning, change the law of Europe, until

now it may be said that the universal rule of modern times is to give immunity to vessels in port on the outbreak of war.

John Bassett Moore in v. VII, p. 453 of his Digest of International Law, makes the following statement:

> "It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A *rule of precisely the opposite effect has been enforced in recent wars.*"

Charles Cheney Hyde, sometime Solicitor for the Department of State, in his recent work on International Law, v. II, p. 516, says:

> "The uninterrupted practice of belligerent powers from the outbreak of the Crimean War down to 1907, when the Second Hague Peace Conference convened, was to allow enemy merchant vessels in their ports at the outbreak of hostilities to depart on the return voyages."

Reference has already been made to Chief Justice Marshall's rule of interpretation in the *Charming Betsy*, 2 Cranch 64, appropriately cited approvingly by the Government in its brief in the *Chemical Foundation* case (p. 196) to the effect that " an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Mr. Justice Peckham in applying, for the United States Supreme Court, the proclamation of President McKinley in 1898 to the case of the *Buena Ventura*, 175 U. S. 384, adopted a similar rule of construction. He said that inasmuch as enemy merchant vessels engaged in innocent commercial enterprises at the time of, or prior to the outbreak of hostilities, "would, in accordance with the later practice of civilized nations,

be the subject of liberal treatment by the Executive," it became necessary, upon the issuance of a proclamation respecting the treatment of merchant vessels, "to put upon the the words used therein the most liberal and extensive interpretation of which they are capable," and that where there were two or more interpretations which possibly might be put upon the language, the one which would be most favorable to the belligerent party in whose favor the proclamation was issued ought to be adopted. This was but an application of the doctrine of the English courts. Mr. Hyde comments upon the decision in the *Buena Ventura* by saying (p. 517):

> "It is not without significance that the Court based its interpretation of the exemption claimed, partly upon the historic attitude of the United States in favor of mitigating, as to all non-combatants, the hardships and horrors of war, and partly also upon the so-called later practice of civilized nations."

Can it be doubted, therefore, in the light of the traditional policy of the United States and of the universal rule of international law prevailing since 1854, that the Joint Resolution of May 12, 1917 is to be interpreted according to its plain meaning as a measure of requisition, under eminent domain, assuring to the owners their right to compensation, and not in a sense contrary to the traditional American policy of leaving private property within our jurisdiction immune from confiscation? To hold, as the Government seems to argue, that the Act of Congress authorizing the President to take over to the United States "possession and title" to the ships in our ports for the use of the Government, was an act of confiscation, is not only to do violence to the language of the Joint Resolution but is to stultify the national history.

Mention has already been made of the United States Naval Code of 1900 which expressly provided that enemy merchant ships found in our ports on the outbreak of war were to be permitted freely to depart. That code provides:

> "Art. 15. Merchant vessels of the enemy that have sailed from a port within the jurisdiction of the United States, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.
>
> "*Merchant vessels of the enemy, in ports within the jurisdiction of the United States at the outbreak of war, shall be allowed thirty days after war has begun to load their cargoes and depart,* and shall thereafter be permitted to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy."

Reference has also been made to the Sixth Hague Convention, dealing specifically with the treatment to be accorded ships in port on the outbreak of war, Article II of which forbade the confiscation of a merchant ship unable "owing to circumstances of '*force majeure*,' to leave an enemy port within the period of grace allowed, or which was not allowed to leave" (*supra*, p. 52).

Reference has also been made (*supra*, p. 52) to the report of the American delegates to the Second Hague Conference who declined to sign the Sixth Convention, not because the policy of immunity from confiscation was not approved, but because in their opinion it did not go far enough and was below the standard of the American rule which gave full and absolute immunity under all circumstances to private enemy ships in port on the outbreak of war.

In view of these positions of the United States, adopted as a traditional policy, is it possible for an

American court to find that Congress in 1917 undertook to confiscate enemy and other merchant ships to which they authorized the President in the national interest to take "possession and title?"

It will require only a few citations of authority to show that the modern rule of international law, which the practice of the United States has not only confirmed, but exceeded, exempts merchant vessels in port from confiscation.

The Institute of International Law in its rules for the conduct of war adopted at the 1898 meeting, provided, Article 41:

> "Merchant vessels compelled by *force majeure* to take refuge in an enemy port, may not be captured therein. They shall be required, during their stay, to conform exactly to the stipulations of the local authority, and to put to sea again within the period that shall be indicated to them." (Annuaire, 1898, p. 154.)

At its 1913 meeting, the Institute adopted the following rule:

> "Article 36. *Extenuation of the principle of capture.* When a * * * private vessel belonging to one of the belligerent powers is, at the commencement of hostilities, in an enemy port, it is allowed to depart freely, immediately or after a reasonable number of days of grace, and to proceed, after having been furnished with a passport, to its port of destination, or to any other port indicated" (Annuaire, 1913, p. 182).

Reference has been made to the declarations of John Bassett Moore and Mr. Hyde to the effect that in every war since the Crimean enemy vessels have been permitted either to depart or have been requisitioned on payment of compensation. It will be unnecessary to cite the relevant documents. They will be found in the Government publication, "Laws of Maritime Warfare,"

prepared by Harold H. Martin and Joseph R. Baker, in May, 1918 (G. P. D., 1918) pp. 21 *et seq.* They establish that confiscation has become obsolete and universally discredited, by no nation more emphatically than by the United States.

Perhaps it may serve a useful purpose in summing up the prevailing rule of international law on the subject, to quote from one of the most celebrated of the modern authorities on international law, John Westlake. At page 42 of v. II of his notable work on International Law, Westlake declares:

> "All ships and cargoes in the harbours of the territory at the outbreak of war, belonging either to the enemy state or to enemy subjects, were seized *under the old law* for the profit of the state, in England by the name 'droits of admiralty'; and this claim was enforced by the British Government as late as the outbreak of war with Denmark in 1807. Indeed it was not unusual to lay an embargo on ships belonging to subjects of a power with which war was imminent in order to detain them within reach of seizure. *But since the middle of the nineteenth century it has been the constant practice in declarations of war to name a time within which enemy merchant ships then in harbour may load and depart;* and it is usual to add that enemy merchant ships which have sailed from a foreign port before the date of the declaration may enter and discharge their cargoes, and then depart with freedom from molestation on their voyage to any port not blockaded. *This, combined with the growing tendency of opinion to favour private enemy property even at sea, may be considered to have made it certain that merchant ships and cargoes in harbour at the outbreak of war* and not belonging to the enemy *state,* with the exception of ships of which the construction indicates that they are intended to be converted into ships of war, *would not again be confiscated.*"

The modern rule and its evolution could not be more clearly expressed than it thus is by Professor Westlake.

While the present claim in no sense rests upon an alleged violation of treaty, it cannot be said to be weakened by the fact that the allegation of confiscation, if sustained, would constitute a radical violation of the treaties with Germany, whereas the claimant's contention, that Congress requisitioned the vessels under its power of eminent domain, implying compensation, would make the Resolution of Congress at least not seriously inconsistent with the treaty. If at all possible—and it is in this case easily possible—a construction should be given to an act of Congress which would not violate the solemn treaty promises of the nation.

By article 6 of the treaty with Prussia of 1785:

> "It is agreed that the subjects or citizens of each of the contracting parties, their vessels and effects shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatsoever."

By. Art. 23, it is provided further that:

> "If war should arise between the two contracting parties, the merchants of either country then resident in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance * * * And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences and comforts of human life more easy to be obtained, and more general shall be allowed to pass free and unmolested. * * *"

This treaty expired by its own limitation in October, 1796.

The treaty of 1799 alters the above provisions. Art. 18 reads:

> "If the citizens or subjects of either party, in danger from tempests, pirates, enemies, or other accidents, *shall take refuge, with their vessels or effects*, within the harbors or jurisdiction of the other, they shall be received, protected and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions and other things necessary for their sustenance, health and accommodation, and for the repair of their vessels."

Art. 23 is to the following effect:

> "If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance. * * *"

This treaty expired June 22, 1810, but the above articles were expressly revived by Art. 12 of the treaty of 1828, which was to remain in force for twelve years:

> "and if twelve months before the expiration of that period neither of the High Contracting Parties shall have announced, by official notification to the other its intention to arrest the operation of said Treaty, it shall remain binding for one year beyond that time, and so on, until the expiration of the twelve months which will follow a similar notification, whatever the time at which it may take place" (Art. XV.)

By article 24 the treaty was made expressly applicable to the contingency of war arising between the two contracting parties.

Here it may be said that the suggestion or construction of the Supreme Court in *Stoehr* v. *Wallace*, 255 U. S. 239, that the Treaty only protected the property of resident Germans, is discredited by John Bassett Moore, the most eminent authority on our treaties. In this connection, Judge Moore (International Law and Some Current Illusions and other essays, pages 20 and 21) says:

> "It would be an idle task minutely to analyze the language of the foregoing treaties in order to ascertain whether some particular confiscation might be enacted without flagrant violation of their precise terms. St. Paul's well-known proverb, that 'the letter killeth but the spirit giveth life,' (Corinthians, II, Chap. 3, Verse 6) is equally expressed in the legal maxim *qui haeret in litera haeret in cortice*, meaning that 'he who considers merely the letter of an instrument goes but skin-deep into its meaning.' (Broom's Legal Maxims, 8th ed., p. 533, citing Coke's Littleton, 283 b). No doubt their phraseology may in some instances have been specially designed, like the terms of criminal statutes, to prevent the repetition of particular odious acts. But, without regard to the words employed and their literal interpretation, there can be no doubt that they were understood to emanate from the general rule against confiscation, which it was not supposed that the contracting parties would seek in any respect to infringe. Even by Magna Carta the pre-war property of enemies, though they were not themselves personally present, was not, simply as enemy property, subject to confiscation by the Crown." (F. E. Farrer, The Forfeiture of Enemy Private Pre-war Property: Law Quarterly Review, Vol. 37 (1921), pp. 218, 337, 353, 356.)

It would thus seem that, aside from the rules of international law and the uniform American practice and policy, the United States had by treaty committed

itself to permit the withdrawal within nine months of the outbreak of war of all forms of private property, owned by citizens of the enemy state. Only such a construction, therefore, of the Joint Resolution of May 12, 1917, as implies an expropriation of the private property, under payment of compensation, could be consistently tolerated. Otherwise, American tradition and policy would be but mere paper professions, subject to destruction at the first gust of an impassioned prejudice.

II.

As the taking of "possession and title" was not an act of confiscation, the only sustainable alternative is that it constituted an exercise of the power of eminent domain or requisition, and hence implied a promise to pay compensation.

It is believed that the exhaustive analysis just made of the Joint Resolution of May 12, 1917, by taking into account its express language, the declarations of Congress and of the Executive, the traditional policy of the United States with respect to private enemy property and the prevailing rules of international law, lead to the inevitable conclusion that Congress, in authorizing the President to take over to the United States for the public use the "possession and title" of the ships which had sought asylum in American harbors, was exercising, not the lawless power of confiscation, but the rightful power of eminent domain or requisition. If this is so, then it also unescapably follows that the taking involved an implied contract to pay compensation, and the action of Congress brings the case squarely within the terms of the Tucker Act.

The Government sought to show in the Court of Claims (Brief, p. 18 *et seq.*) that this case is one not

arising under the Constitution or an act of Congress, or on a contract, express or implied, but is one sounding in tort. The Court of Claims did not sustain the theory of tort, but nevertheless denied that the proceeding was "founded upon the Constitution or a law of Congress" and also denied that the taking of "possession and title" implied any obligation to pay compensation.

It is hard to conceive how the Joint Resolution of May 12, 1917 under which "possession and title" to these vessels were taken over to the United States is anything but an Act of Congress. The President acted rightfully, and not wrongfully, and so did Congress, so long as compensation for the taking is implied, as it must be. Congress in the very Resolution itself provided for the valuation of the vessels by a board of survey, and these values were to be considered as "competent evidence in all proceedings on any claim for compensation". Certainly it would be hard to make it any clearer that a claim for compensation, in judicial proceedings, was contemplated, and that Congress was making provision to facilitate such proceedings. If this does not imply the very opposite of confiscation or tort, then no words, it is believed, can have that effect. The very use of the word "compensation", shows that compensation was intended and implied, and as this case arises both out of a Joint Resolution and a contract, express or implied, it is clearly within the jurisdiction of the Court of Claims.

It must be recalled that as yet none of the owners or others interested in the property expropriated have had a hearing to determine whether the property was rightfully taken or to establish their interest. It would be most extraordinary if property in the United States can be taken from its owner by Act of Congress, without notice or opportunity for a hearing, before or after the event. Manifestly, Congress believed that in providing for a subsequent "claim for compensation," they were

supplying that necessary element of due process of law which is fundamental in American procedure.

In its attempt to show that the taking of "possession and title" to these vessels under a Joint Resolution of Congress is not a taking involving an obligation to pay compensation, the Court of Claims cites and quotes from several cases in which seizures of enemy property by military officers of the Government have been held to be torts. The Court fails to point out the very vital operative fact that all these seizures were made by military officers *in the field of military operations in enemy territory*, and hence naturally cannot give rise to an implied promise to pay. Nor were they made under a Joint Resolution or act of Congress, but on the discretionary order of a military officer on the spot. The vessels in this case were lying in ports of the United States, under protection of American public law, and were seized and requisitioned for public use. The private title was fully recognized by Congress, and the fact that the public use was war service or commercial service by the Shipping Board in no manner diminishes the implied, if not, indeed, express, intention and promise to pay for the private property thus taken.

Before examining some of the more well-known cases on the subject, it may be proper to allude to the cases cited by the Court of Claims to prove that the taking of "possession and title" to the vessels in the present case involved no promise to pay.

In the *Ribas y Hijo* case, 194 U. S. 315, the Supreme Court expressly says, in denying the implied promise to pay compensation for a vessel taken by the U. S. military forces on the capture of Ponce, Porto Rico, and used by them for a short time:

> "The seizure, which occurred while the war was flagrant, was an act of war, *occurring within the limits of military operations.*"

In the *Herrera* case, 43 Ct. Cls. 430, the capture was made by the American army in Spanish waters, near Santiago, Cuba. The Supreme Court (222 U. S. 558) points out the fact that Cuba was enemy's territory and that the vessel was seized in the course of military operations.

In *Juragua Iron Co.* v. *United States*, 212 U. S. 297, the building destroyed by order of General Miles was burned as a military measure because of the prevalence of yellow fever. Justice Harlan distinguishes the case from *United States* v. *Great Falls* and *United States* v. *Lynah*, presently to be discussed, and adds:

> "But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war *in the enemy's country*?"

That the Government is not unaware of the inapplicability of the *Juragua Iron Co.* case may be inferred from its comment upon that case in the Government's Reply Brief in the *Chemical Foundation* suit (p. 119) where it is said:

> "The first (*Juragua* case) involved property belonging, it is true, to an American corporation, but situated in Cuba and *in the zone of military operations* of the Spanish War. The property was destroyed by the military authorities for the protection of the Army. This presents an entirely different question."

So the *Moore* case, 10 Ct. Cl. 375 and the *Green* case, 10 Ct. Cl. 466, which the Court of Claims cites, are utterly inapplicable. Both involved the seizure of abandoned enemy property *in hostile territory in the course of military operations*, the former in North Caro-

lina, the latter in Nashville. In the latter case, the quotations printed in the Government's brief (p. 20) amply show that it has no bearing on the cases now before this Court. The court in the *Green* case said:

> "The seizure of the claimant's property was *not a taking of private property for public use*, but was to all intents and purposes a *military measure*, directed to the end of carrying on the war for suppressing the rebellion.
>
> "Our conclusion is that the Government is not liable upon implied contract to any person, loyal or disloyal, for property taken by its agents, civil or military, during the rebellion, *within the insurrectionary districts.* * * *"

Klein's case, 13 Wall. 128, *U. S.* v. *Anderson*, 9 Wall, 56, *Haycraft* v. *U. S.*, 22 Wall. 81 and *Lamar* v. *Browne*, 92 U. S. 187, also cited by the Court of Claims, are equally irrelevant. They have been considered by my colleagues in their briefs.

In the *Castello* case, 51 Ct. Cl. 221, the Court points out (p. 227):

> "It is sufficient to observe that the *military forces of the Government were actually engaged in the suppression of flagrant hostility* to the authority of the Government, and that the *officer in command of the forces* of the defendants seized the property of the claimant as enemy property under the belief that its possessor as well as the vessel itself was being employed in active aid of local revolution."

As already observed (*supra*, p. 11) the Court of Claims fails to make one of the most fundamental distinctions under the war power, constitutionally considered, as well as under international law, namely, the distinction between the destruction or seizure of property *in the actual course of military operations in enemy territory* and the appropriation of private prop-

erty within the state's own jurisdiction *in advance* of actual military operations, for subsequent use in military or other public service. The distinction is vital and elementary.

See:

Vattel, *Law of Nations*, Chitty-Ingraham ed., sec. 232, p. 402.

Bentwich, Private Property in War, London, 1907, p. 41.

H. Rep. 386, 22nd Cong., 1st Sess., pp. 9-10.

Lawrence's Report on Claims against Governments, H. Rep. 134, 43rd Cong., 2nd Sess., 126.

Nys, Droit International (1912 ed.) v. III, ch. XI, pp. 450-462.

With respect to the requisition of such private property within the jurisdiction of the United States for the public use no distinction has ever been made by the United States between the property of citizens and aliens, and it is apparent from the Joint Resolution of May 12, 1917 that Congress did not intend to make any such distinction in this case. On the contrary, it is evident from the Resolution and the entire debate that they contemplated that the owners, whatever their nationality, would be compensated.

The ships having been seized under an act of Congress there is an implied contract agreeing to compensate the owners thereof.

In the case of *United States* v. *Lynah*, 188 U. S. 445, the question was as to the jurisdiction of the Circuit Court under the Tucker Act on an action to recover of the United States the sum of $10,000 for the total destruction of real property as the necessary result of the acts of U. S. officers in improving navigation. In the course of his opinion Justice Brewer said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary, and a govermental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The rights of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities, or the exigencies of the occasion demand. So, the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when this government right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

"The government may take real estate for a post office, a courthouse, a fortification, or a highway; *or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated?* Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is

the import of the cases cited as well as of many others.

* * * * *

"Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses and that the government is under an implied contract to make just compensation therefor" (p. 474).

In *Philippine Sugar Estates Development Co.* v. *United States* (40 Ct. Cl. 33), it appeared that the United States had taken possession of certain houses and grounds for the use of the Army, and in the course of the opinion in that case the court said:

"Without repeating more fully the general rules set forth in the original opinion of the court respecting the appropriation of private property and the obligation of the government to pay for the same, it is now enough to say that the promise of compensation would be implied had the government, not claiming to own the property, appropriated the same to its permanent use under the right of eminent domain."

In conclusion the court said:

"The President's order was supported by the constitutional obligation of the government to pay because of the circumstances under which the property was taken and its appropriation to the public use. (Fifth Amendment to the Constitution.) The order was also in line with the construction which created the obligation on the part of the government to reimburse the proper owners for property taken and used in emergent circumstances. (*United States* v. *Russell* 1872) 13 Wall. (U. S.) 628, 20 L. ed. 475. The emergency gave the right to take, and the emergency has been shown to exist which justified the taking."

In the case of *United States* v. *Russell*, 13 Wall. 623, the United States took into its service certain already

officered and manned steamers of a citizen of the United States, and the court said (p. 629):

> "Such a taking of private property by the government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.
>
> "Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law."
>
> "Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the executive department, and not to the court of claims."

In the case of *Blake* v. *United States*, 275 Fed. 861, certain coal was requisitioned by the government under the National Defense Act, and the court said (p. 867):

> "In *United States* v. *Russell*, 13 Wall. 623, 20 L. Ed. 474, it was held that where the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied, and that the government is bound to make 'full compensation' to the owner."

In *United States* v. *Pacific R. R.*, 120 U. S. 227, the court held:

> "In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war, or buildings to be used as store-houses and places of deposit of war material, or to house soliders or take care of the sick, or claims for supplies seized and appropriated. In such cases it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 13 How. 134; *U. S.* v. *Russell*, 13 Wall. 623."

In *Langford* v. *U. S.* 101 U. S. 341, the court held:

> "We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for

public use, as for an arsenal, custom-house, or fort, land to which it asserts no title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called upon to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the court of claims. On this point we decide nothing."

In *U. S.* v. *Great Falls Mfg.*, 112 U. S. 645, 656-657, 5 Sup. Ct. 306, 311 (28 L. Ed. 846), the court held:

"* * *. we are of opinion that the United States having by its agents, proceeding under the authority of an act of congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. *The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract within the meaning of the statute, which confers jurisdiction upon the court of claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'*

* * * * *

"Having abandoned the proceedings of condemnation, the proper officers of the government, in conformity with the Acts of Congress, constructed the dam from the Maryland shore to Conn's Island, the doing of which necessarily involved the occupation and use of the property, as contemplated in what was called the fourth plan for bringing water from the Great Falls to Wash-

ington and Georgetown. In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the Government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

In *United States* v. *Buffalo Pitts Co.* (1914) 234 U. S. 228 the Supreme Court held, by Mr. Justice Day:

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this Court, and arises because of the Constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States guaranteeing the owner of property against its appropriation for a governmental use without compensation."

Reference has already been made (*supra*, p. 13) to the statement by Mr. Justice Brandeis, speaking for this Court in *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330, 333:

> "When the Government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor. * * * In order that

> the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

The case of these ships and other maritime property taken over by the President under authority of Congress comes squarely within these rules.

In *Portsmouth Harbor Land & Hotel Co.* v. *United States* (1922) 260 U. S. 327, 330, a case much weaker on its facts than the case at bar, for in that case there was no enabling statutory authority, this Court, through Mr. Justice Holmes, said: "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied whether it was thought of or not."

In *Duckett* v. *United States*, 266 U. S. 149, Mr. Justice Holmes for this Court pointed out that "acts" "determined the relations of the parties." He held that an implied promise to pay arose from the order proclaiming the taking of certain docks in that case. "Whatever the effect of the taking, there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims." The order was even less emphatic as to compensation than is Section 2 of the Joint Resolution of May 12, 1917, here in issue.

A more recent application of the same rule that a taking of private property for the public use, under authority of Congress, constitutes an exercise of the power of eminent domain, and that from the taking there arises an implied promise to pay compensation, is to be found in Mr. Justice Butler's opinion, for the Court, in *Campbell* v. *United States*, 266 U. S. 368.

Contrary to the apparent belief of the Court of Claims, the Fifth Amendment is not suspended in the United States by the outbreak of war, and private

property, *in the United States*, even of alien enemies, enjoys the protection of the Constitution and of private and public law. It is doubtful whether Congress could by statute take away from such property the protection of the Constitution. But even if it could, it manifestly has not done so. On the contrary, all the evidence from all sources without exception, indicates that Congress intended to and did adhere to the enlightened traditions of the United States and the rules of international law by according to the private property of enemy citizens, and in particular, of the property here in issue, the fullest legal protection. So long as Congress has failed to take any confiscatory action, the property enjoys the same safeguards against being taken for public use without compensation as does any other property located in the United States. Ships in port are equally protected with property on land. Ordinarily, the value of these ships might have been turned over by the Navy Department, the Shipping Board, or the Treasury, to the Alien Property Custodian, to be held until the end of the war or until Congress acts under Section 12 of the Trading with the Enemy Act. But as timely demands were not served on these Departments, the only entitled claimants are the owners of the vessels.

It is submitted that in these cases the only possible alternative to confiscation, which no one would probably now assert, is expropriation or requisition under eminent domain. Such taking implies a promise to pay, and from the right to receive such compensation no owner, not even an alien or an alien enemy, is deprived. The latter's privilege of suit is suspended until the end of the war, but his substantive right is unimpaired. Unless the legal and political history of the United States is to be stultified, the owners of these expropriated vessels have a right to the com-

pensation which Congress in 1917 manifestly intended they should have. The only forum in which "proceedings" can be brought on their "claim for compensation" is the Court of Claims under its long-established jurisdiction, now codified in Section 145 of the Judicial Code.

III.

Nothing in the Knox-Porter Resolution, the Treaty of Versailles, or the Treaty of Berlin, prevents the payment of compensation for the requisitioned vessels.

In the Court of Claims the Government sought to show that the Knox-Porter Resolution and the Treaty of Berlin "carried into and incorporated in the substantive law of the United States" the provisions of the Treaty of Versailles on reparations, including article 297, Annex, paragraph 2, which, it was alleged, bars a German national from making any claim for property taken from him under any circumstances. The Court of Claims did not consider this question, but it deserves a passing discussion.

Apart from the questionable morality of such a contention, the Government's view that the Treaty of Versailles has been carried into the substantive law of the United States is quite erroneous. While it is true that the United States did, in the Knox-Porter Resolution (42 Stat. Part I 105) and in the Treaty of Berlin (42 Stat. Part II 1939) reserve to itself

> "all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it * * * became entitled under the terms of the armistice signed November 11, 1918 * * *; or which were acquired by or are in possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully en-

> titled; or which, under the treaty of Versailles, have been stipulated for its or their benefit, * * *"

the fact is, that none of these reservations can have any relation to the compensation to which, under the Joint Resolution of May 12, 1917, the owners of the ships here in question are by American public law entitled. In fact, any of these reservations of which we might desire to take advantage had to be specially designated by Congress or the political department of the Government. The reservations to which the Government in its brief below referred, relate to Parts VIII and X on reparations, from which it is a well-known fact that the United States has excluded itself. The settlement of our claims against Germany has been undertaken in a way directly contrary to the method provided for in the Treaty of Versailles. It would seem therefore most startling if the Government's position could be sustained, namely, that the Treaty of Versailles had by reference been "carried into * * * the substantive law of the United States." Only upon the United States electing to adopt the provisions of the Treaty of Versailles relating to reparations, and then only, of course, upon the assumption of the corresponding obligations involved in the acceptance of those articles, could the Treaty of Versailles, or any part thereof, be deemed binding on the United States.

Articles II of the Treaty of Berlin expressly provides that

> "the United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty (of Versailles) mentioned in this paragraph *will do so in a manner consistent with the rights accorded to Germany under such provisions.*"

So Article IV of the Treaty of Berlin provides:

> "That, while the United States is privileged to participate in the Reparation Commission, ac-

cording to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so."

No one has made the non-applicability to the United States of Article 297 of the Treaty of Versailles more clear than Professor Hessel Yntema in his study on the relation between the Treaty of Berlin and the Treaty of Versailles, published in the *Columbia Law Review* for June, 1923 (v. XXIII, p. 511). After analyzing the two treaties and the Knox-Porter Resolution, he draws the following conclusion as to the applicability of the Treaty of Versailles to the United States (pp. 523-524):

"Incongruously enough, it has been maintained that, in spite of its actual repudiation *in toto* by the United States, the Treaty of Versailles, exclusive of the portions specified in Article 2 of the Treaty of Berlin, has in effect been implicitly accepted and ratified by the United States through the adoption of the remaining portions in the same Article and the admission by the United States of their limiting as well as concessionary application to claims supported under the Treaty in which they are comprised. The contention proceeds upon the assumption that, by the partial adoption of the Treaty of Versailles *as an optional basis of American claims* and by the supposed fact that the claims which may be asserted as under that Treaty are coextensive with those which may be otherwise derived, the Treaty of Versailles is to be regarded as binding upon the United States except in so far as portions thereof have expressly been excluded in the Treaty of Berlin and it is concluded that the United States in urging any and all claims under the latter treaty must submit to such limitations as may be inferred from the unexcluded portions of the Treaty of Versailles.

It would indeed be passing strange if the Treaty of Versailles, after its complete repudiation by the Senate of the United States and by grace of the later amputation of provisions to which the United States was unwilling to accede, should then have virtually been ratified through the underground railway of the Treaty of Berlin. Yet such is the implication of the foregoing contention, which, in the absence of any express provision to the effect stated, is to be rejected on that very practical ground alone. Furthermore, the argument is in the face of the clear provision in Section 2 of the Joint Resolution of Congress of 2 July, 1921, primarily adopted in Article 1 of the Treaty of Berlin, that the rights and advantages stipulated for the benefit of the United States under the Treaty of Versailles are *'reserved'* to the United States, *the inference being that correlative obligations will be imposed upon the American Government only in the event and to the extent that its option to assert such rights and advantages is exercised.* In short, it cannot be too much emphasized that the Treaty of Versailles has been definitely refused the ratification of the United States and is, therefore, not binding upon the United States *proprio vigore.* The situation is rather that the substance of certain of its provisions are to be read into the Treaty of Berlin *conditionally upon the assertion of claims by the United States in accordance therewith.*"—(Italics ours).

With respect to Parts VIII and X of the Treaty of Versailles, dealing with reparations, on which the Government seems primarily to rely in its view that the provisions of that Treaty have been "carried into * * * the substantive law of the United States," it may be said that the United States is not in principle sharing in the reparation payments made and to to be made by Germany. Secretary of State Hughes, in his speech at New Haven, Conn. December 29, 1922, expressly de-

clared: "We are not seeking reparations." Moreover, it is public knowledge that the Allied Governments in the Spa Agreement of 1920 divided up the German reparations in certain proportions which completely excluded the United States.

Article 237 of the Versailles Treaty provides that German payments were to be divided by the Allied and Associated Powers in proportions which have to be determined upon by them in advance on a basis of general equity and of the right of each.

In practice the basis of distribution up to 93.5 per cent. was settled in July, 1920, at the Inter-Allied Conference at Spa.

According to the Fifth Report of the Reparation Commission, London, 1923, "a later agreement fixed the share of the Serb-Croat-Slovene State at 5 per cent., thus raising the total distributed to 98½ per cent.

The Official Summary of the Spa Agreement as printed in the Appendix to Keynes' "A Revision of the Treaty," London, 1922, p. 189, is as follows:

"I. The Spa Agreement, July, 1920.

(A) Summary of the Agreement upon Reparations between the Allies, signed by the British Empire, France, Italy, Japan, Belgium, and Portugal. Article I provides that in pursuance of the Treaty of Versailles the sums received from Germany for reparations shall be divided in the following proportions:

France	52 per cent.
British Empire	22 " "
Italy	10 " "
Belgium	8 " "
Japan and Portugal	¾ of 1% each

The remaining 6½ per cent. is reserved for the Serbo-Croat-Slovene states and for Greece, Rumania, and other Powers not signatories of the Agreement."

The United States, however, was excluded from the distribution and hence rejected all participation in the clauses of the Treaty dealing with reparations, including those sections upon which the Government seems to rely. Under the Dawes Plan and the Paris Agreement, the United States is to receive a small annual payment to cover Rhine Army Costs and American pecuniary claims.

The Government appears to rely primarily on paragraphs (d), (h) 2, and (i) of article 297 and paragraph 2 of the Annex to article 297 to defeat the present claims.

Apart from what has just been said with respect to the inapplicability, by reason of American non-acceptance, of article 297 to the United States, it can be shown that these specific clauses have been either expressly or by necessary implication rejected by the United States.

Paragraph (d) of article 297 provides:

> "As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

This can have no relevancy to the present claims, even if the whole subject had not been definitely dealt with independently by Congress, by reason of the fact that the validity and binding character of the Joint Resolution of May 12, 1917, is not disputed. It is merely contended that certain legal results flow therefrom, namely, a claim to compensation.

Paragraph (h) 2 is one of three paragraphs dealing with the method which the Allied and Associated Pow-

ers may adopt in disposing of *'the net proceeds of sales of enemy (German) property''* in their possession.

In the first place, it may be said that the ships here in question or the values for which claim is now brought, are not "the net proceeds of sales of enemy property." Art. 297 (h) has, therefore, not the remotest application to these claims.

But even if the claim were to be regarded as instituted for the proceeds of liquidated property or cash assets seized by an Allied or Associated Power, it would still follow that the United States had excluded itself from Art. 297 (h) 2. The proceeds of liquidated property, under Article 297 of the Treaty of Versailles, are to be dealt with in one of three ways, according to the class into which a particular Allied State falls. The three classes of states are:

1. States which adopt the Clearing House provisions, for mutual discharge and set-off of private debts, from which provisions the United States has excluded itself;

2. New states and states "not entitled to share in the reparation payments," which are obliged to return private property directly to its owners; and

3. States which are entitled to share in reparations, which may use the proceeds of liquidated property to satisfy claims against Germany arising out of exceptional war measures, paying the balance either directly to the owners or to the Reparation Commission as provided in article 243.

Whether the United States is a country "not entitled to share in the reparation payments," which, by its own voluntary renunciation, seems to be the case, or whether it is a country "entitled to share in reparation payments," it appears to have adopted none of the methods provided for in Article 297 (h). It has neither

paid the proceeds of liquidated property to its owners under (2) above, nor has it used the proceeds in accordance with (3) above, to discharge claims of American citizens arising out of exceptional war measures of Germany, paying the balance to the Reparation Commission or to the owner. Instead, the United States has adopted a third course, not provided for in the Treaty of Versailles, of returning to its owners a considerable part of the sequestered or liquidated property—which can refer only to land property in the United States—but has retained the balance for the present, paying interest thereon to its owners (Act of March 4, 1923 42 Stat. 1511), until Germany makes suitable provision for the satisfaction of American claims. This complete departure from the provisions of Article 297 (h) of the Treaty of Versailles is sufficient to show that the United States has rejected that Article.

So far as concerns paragraph (i) of Article 297 by which

> "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States,"

it may be said that this section refers to the liquidated property under (h), from which, as already observed, the United States has excluded itself. In addition, it may be said that the owners of German property in the United States have no power to invoke Article 297 (i), for the United States is not deemed to have confiscated or retained any German private property, so as to give them a claim against Germany under the Treaty of Versailles. In fact, Article 297 (i) has no reference whatever to ships.

So far as concerns paragraph (2) of the Annex to Article 297, reading:

> "No claim or action shall be made against any Allied or Associated Power or against any

person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power,"

it may be said that this has, of necessity, reference only to the provisions of article 297, just mentioned. That article, in dealing with German property, has no reference to the United States, as already observed. But such application as it has to the citizens of Allied Powers is confined to those provisions of Article 297, which relate to the liquidation of German property, special damage to which is barred from becoming the subject of a claim, (contrary to the status of Allied private property liquidated by Germany) by virtue of Annex 2 to Article 297. The Annex can only be read in connection with the Articles to which it is appended, and not independently of its context, to cover claims not touched by or having any relation to it. That the Annex is confined to claims for special damage to liquidated property (over and above its intrinsic value, of which the private owner is assured by the Treaty) is evident from the decision of the French-German Arbitral Tribunal in the case of *Societé Vinicole de Champagne versus Consorts Mumm* of October 24, 1921 (Recueil des Decisions, v. 1, p. 694). The claim of this concern alleging the invalidity of a French war measure and for damage resulting therefrom was rejected under Annex (2) to Article 297, whereas their claim for the intrinsic value of the proceeds of the liquidation of their business in France was recognized, to the full amount of 85 million francs.

It will thus be apparent that the Government in support of its demurrer in the Court of Claims invoked clauses of the Treaty of Versailles which have no application to the United States. It could be shown by further analysis, for example, by the fact that the German owner is given a claim before a Mixed Arbitral Tribunal under Article 304, if his property has been undervalued or liquidated at inadequate prices, that the United States has completely rejected all these provisions of the Treaty of Versailles relating to the disposition of German private property or claims arising therefrom.

It is, of course, a historical fact that the United States refused to place the requisitioned German and Austrian merchant ships in an Allied pool to be distributed by the Reparation Commission according to losses. The United States declined to enter into this arrangement, not only because it abstained from any relation to the Treaty of Versailles and the Reparation Commission, but because the United States had already taken complete "possession and title" to the German and Austrian vessels and they were no longer German and Austrian but American vessels. (Senate Document 231, 66th Cong. 2nd sess.) The Allied Powers gave Germany credit in reparation account for all German tonnage seized and appropriated by them, though in no case was tonnage in port at the outbreak of war generally confiscated. See *The Blonde* and Other Ships, (P. C.) (1922) 1 A. C. 313. The owners of such surrendered vessels were compensated, at least in trifling part, under the Treaty of Versailles, by the German treasury. The United States has not only not given Germany any credit in reparation account for the vessels seized in American ports on the outbreak of war, but it purported not to have any reparation account. Nor have the owners been given any compensation for the vessels of which they were deprived,

either by Germany, from which it is not due, or from the United States, from which it is due.

The Government in the Court of Claims (Brief, p. 22) appears to have relied in part upon section 5 of the Knox-Porter Resolution as a ground for denying the jurisdiction of this Court. That section provides that

> "all property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or their successor or successors shall have * * * made suitable provision for the satisfaction of all claims against said Government * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * loss, damage," etc.,

through acts of the German Government or its agents.

It can, it is believed, be demonstrated that this section was designed solely to enable the United States to retain temporarily, as a pledge for the satisfaction of American claims, the property in the hands of the Alien Property Custodian. This is proved not only by the debates in Congress, and the declarations of Senator Knox, the author of the section, and Representative Porter, the co-author of the Peace Resolution of July 2, 1921, in which the section is found, but by the surrounding circumstances and subsequent history.

Section 5 was inserted in the Joint Resolution at practically the last moment before passage, June 28, 1921. In the course of the debate in the Senate, June 30, 1921, Senator Knox, the author, explained the pur-

pose of the section as follows (*Congressional Record*, 67th Cong., June 30, 1921, v. 61 p. 3397, other edition page 3249).

MR. KNOX:

"The purpose of inserting that provision was this: We had a treaty with Prussia running away back, I think to 1799, and renewed in 1828—I may not be correct about the dates, but the Senator knows of what I am speaking—in which we made a specific agreement with Prussia that even in case of war the rights of private property should be sacred. The State Department under the last administration failed to indicate that that treaty was not in force, and under the general rules of international law it would, I think, be construed to be in force.

"Of course the alien enemy act was in direct violation of that treaty if that treaty was in force. Of course the Senator knows the general proposition that the coming on of a war between two countries *ipso facto* terminates the treaties between those countries; but we made a treaty with the fact in view that we might possibly at some time be at war, and we passed an act of Congress which, of course, violated the terms of that treaty. We did not propose to become complicated with Germany upon that proposition, and therefore this joint resolution suggested that all of the seizures and all of the fines and all of the penalties imposed by the United States upon Germany and German nationals during this war should be confirmed by the German Government, and all claims which, I might state and I think I am entitled to state, morally would have arisen against the United States for the violation of a treaty which she had agreed should subsist even during a war should be waived, not with the idea, however, that ultimately the United States would shrink from her moral obligations to German citizens or nationals whose property she had taken, but until a fair adjustment by treaty should be made

between the United States and Germany covering the claims of American citizens against Germany for seizures and fines and penalties that had been imposed upon them. * * *"

MR. KNOX:

"The language the Senator has in mind *only has reference to the thing that has already been done by the Alien Property Custodian.* The whole theory is this: Speaking for myself personally, *I hope the day is not far away when we shall come back to the traditions of the American people that the right upon land of private property belonging to an alien enemy is a sacred right;* that such property may be taken into custody only for the purpose of conservation; and that at the end of a war there shall be a strict accounting to the owners of that property by the Government of the United States, which may take it temporarily into its possession. That is one of the principles for which this country has contended for a hundred years. While, as Chief Justice Marshall said, the Congress may have the power to provide that the private property of alien enemies may be taken during a war, it can only do so by putting upon itself a moral turpitude of which we ought to be ashamed.

"The purpose of the joint resolution is simply to hold in status quo the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany *for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it."*

Nothing could make clearer than this language of the author that the purpose of section 5 was solely and alone to enable us to retain the private property in the hands of the Alien Property Custodian, as security for the payment of American claims. The ships to which

"possession and title" had been taken in 1917 were not thought of in this connection, for they were no longer German property in any sense.

Mr. Knox continued, in reply to a question from Senator Walsh:

> "I will go as far as any Senator in this Chamber in trying to deal with the German citizen whose property we have taken on a basis that conforms to the traditions of our country, but I want to avoid the complications that will arise out of claims presented diplomatically and otherwise. God knows that when we have the power to deal with foreign nations in respect to anything we do it with the utmost generosity, liberality, and altruism" (*ibid.*, p. 3398, other edition page 3250).

Representative Porter, Chairman of the House Committee on Foreign Affairs, explained in the House the meaning of section 5 of the Knox-Porter Resolution.

MR. PORTER:

> "Mr. Speaker, in view of the fact that the Senate accepted the House resolution, it is unnecessary to make other than a very brief statement:
>
> "The first added section makes more specific *the control of alien enemy property*. It is the opinion of your conferees that the rights of the United States and its nationals are fully protected by section 2 of the House resolution, which reserves all the rights, privileges, indemnities, reparations, or advantages under the treaty of Versailles, and the further reservation of all rights, privileges, indemnities, reparations, or advantages 'by virtue of any act or acts of Congress.' *Our possession of the alien property* is by virtue of acts of Congress and the reservations of the House resolution are sufficient. However, some concession has been made and it will do no harm to add the section" (*ibid.*, p. 3401, other edition page 3254).

Representative Burton, of Ohio, a member of the Committee on Foreign Affairs, in speaking on June 13th, 1921, of a proposal similar to that incorporated in section 5 of the Knox-Porter Resolution, said:

> "The total value of enemy property seized by us is estimated at $350,000,000. This may not be sufficient to meet just claims for reparation, but we could occupy no better situation in this regard if a technical state of war continues" (*ibid.*, p. 3059, other edition page 2515).

This statement clearly shows that only the property in the hands of the Alien Property Custodian was in contemplation as security for American claims, for its amount had repeatedly been stated as about $350,000,000. As a matter of fact, it appears that the American claims now being allowed by the Mixed Claims Commission will probably come to considerably less than the value of the property in the hands of the Alien Property Custodian. The present estimate for the claims of private citizens is about 160 million dollars. The ships having completely passed into American ownership, were no longer thought of as German property or associated in any way with the idea of retention as security for American claims.

So in reporting to the House the changes made by the Conference Committee on June 28, 1921, in the Peace Resolution, the Conference Report states:

> "Two sections have been added to the House Amendment. The first of the new sections—section 5—*makes more specific the treatment to be accorded to alien enemy property.* While in the opinion of your conferees the original House provisions furnish ample safeguards, there appears to be no valid objection to an additional provision of this character" (*ibid.*, p. 3320; other edition page 3254).

In the debate in the House on section 5, it is evident that only the property in the hands of the Alien Property Custodian was deemed to come within its provisions. A few extracts from that debate (*ibid.*, pp. 3403-3404; other edition pages 3256-3257), will amply demonstrate the correctness of this conclusion:

"MR. COOPER:

"Now, I want to ask the chairman whether that word 'seizures' relates only to seizures, or would it, or would any phraseology in this amendment, if enacted into law confirm the sales of the millions of dollars' worth of alien property sold by A. Mitchell Palmer, many of which sales were private?"

MR. PORTER:

"In the first place, the confirmation is limited to the United States. It does not extend to our nationals. There is quite a distinction between a seizure and a sale. We purposely omitted confirmation of sales for fear it might confirm sales that are alleged to have been fraudulent. A seizure of necessity is by the United States Government and we merely confirm that act. A seizure may be perfectly legal, as our seizures were, while a sale of the seized property might be illegal.

"All through the drafting of this legislation we kept that point to the front, and I feel certain that there is nothing in this resolution that will confirm either directly or indirectly any fraudulent sales, if there were any * * *."

MR. COOPER, of Wisconsin:

"Mr. Speaker, the gentleman from Pennsylvania, the chairman of the committee, says this point was kept to the front during the drafting of the resolution. Yes; and if I may say it without violating the rules of propriety, I desire to add that I helped to keep it to the front, and that I helped to keep it to the front, Mr. Speaker,

because of the work of A. Mitchell Palmer and of what I had learned of the attitude and purpose of his successor, the present Alien Property Custodian.

"And this reminds me that yesterday one of the papers published in this city contained the statement that the resolution as now presented to the House by the conferees had been drafted *in consultation with, and embodied the suggestions of, the present Alien Property Custodian.* Now, his desire and purpose are clearly shown in the brief which he submitted to the Committee on Foreign Affairs, and a copy of which I have in my hand. From it I now read."

MR. PORTER:

"It appears that while we are in possession of *a large amount of alien enemy property, we have made demands for other property and the demands have not been complied with.*"

MR. LUCE:

"The section under consideration, section 5, appears to reach, in the last line on the first page of the report, a declaration *that the future of this property* shall be provided for by law. Then the rest of the section appears to go on with a provision, as *to the disposition of the property,* but leaves it uncertain whether this provision is to be taken as a declaration of policy or as in itself a statute involving in certain contingencies the fate of the property. Will the gentleman tell me whether it was intended that the latter part of the section should be in the nature of a statute?"

MR. PORTER:

"The purpose of the section is to perfect all of the rights of the United States and its nationals. It is a reservation of the rights of this country. It is not a suggestion as to the terms of the treaty, our purpose being to preserve the status of the parties."

Mr. Luce:

"I quite understand that, and I approve and agree with it, but in the latter part of the section you proceed to declare *that this property shall be held until a certain event, namely, the performance of a condition imposed on certain foreign Governments.* This leads to serious complication * * *."

Mr. Towner:

"If I may make the suggestion, I will say to the gentleman from Massachusetts that that is law, that every word of section 5 is law. It is properly what might be called *ad interim* law. It is made with the expectation that thereafter this Government will take further action about it, either by more law or by a treaty which will have the force and effect of law. It occurs to me that there can be no complication in regard to the matter because *in effect all of this is to hold the property in status quo.* * * *"

Mr. Cockran:

"There is not one of these alleged conditions that can have any actual result whatever.

"Let us assume that they were all stricken out. We would have still remaining all that a resolution of this character can possibly effect. You can add nothing to it as a declaration of peace by declarations of what you intend to do with certain property seized in the course of the war.

"*That property is in our possession—ours to do with as we please.* Whether we declare our purpose in respect to it now or at some other time is of no consequence whatever."

In this connection, certain other significant facts besides the debates warrant consideration. Section 5 speaks only of property which has "come into the possession or under the control of, or has been the subject

of a demand by the United States." It is significant that no mention is made of property of which *title* had already been taken by the United States. This would seem to show that Congress realized that only German property then in the hands of the Alien Property Custodian was to be held in pledge for American claims. The ships had long passed out of German ownership, and their fate was to be settled independently. Not a shred of evidence has been found to warrant the belief that the ships or their value are regarded as a pledge for the American claims or were in any way included or referred to in section 5 of the Knox-Porter Resolution. In fact, all the evidence shows that the ships from the very beginning were dealt with by Congress independently of the land property seized by the Alien Property Custodian.

In the case of the land property, ultimate disposition was left to Congress; in the case of the ships complete "possession and title" had been taken as far back as 1917, and there was nothing further for Congress to do. The law would take its course, as several members of the House debating the Joint Resolution of May 12, 1917, correctly declared. That law the claimants are now before this Court to vindicate.

It may also be observed that when the Winslow Act was passed, March 4, 1923, returning $10,000 to every owner of property held by the United States under section 5 of the Knox-Porter Resolution, an effort was made to include the ship-owners in the benefits of the Act. The effort was unsuccessful, because it was deemed that the ship-owners were in a class by themselves, whose property was not being held as security for American claims.

It is believed, therefore, to have been demonstrated that the seized ships do not fall in any way within the property retained as a pledge for American claims, under section 5 of the Knox-Porter Resolution, and

that they are, therefore, not in any sense, included in the Treaty of Berlin. They are quite outside the Treaty, and the present claims must be determined quite independently of any provision of the Knox-Porter Resolution, the Treaty of Versailles or the Treaty of Berlin.

IV.

The Court of Claims had Jurisdiction of These Claims.

The present claim is made not for specific ships or property held by the United States, but for the value of property of which the claimants were deprived by Act of Congress and the President, in 1917, by virtue of which their ships were appropriated and taken for the public use, as the Joint Resolution of May 12, 1917, authorized and provided.

It is believed that it has been demonstrated that the Joint Resolution of May 12, 1917, was not an act of confiscation, but, as it purported to be, an exercise of the power of eminent domain over private property within the jurisdiction of the United States. By the terms of the Resolution and the uniform practice of the United States, which cannot be lightly disregarded, the taking involved a promise to pay.

These operative facts have as their necessary consequence a legal claim within the jurisdiction of the Court of Claims. The claim is not a political one for Congress to settle. Congress has already fully acted in the premises by authorizing the President to take over to the United States the "possession and title" of privately-owned ships lying in American harbors, and intentionally left the legal consequences to be determined by the law of the land. In full contemplation of that law, they provided that the valuation of the ships thus

taken over was to be ascertained by a Government Board, and they made special provision that the findings of this Board should constitute "competent evidence in all proceedings on any claim for compensation." It seems sophistry to doubt what these words mean. Congress has laid the ground-work of fact on which the law must now take its course. It seems hardly possible to conceive a case more clearly within the jurisdiction of the Court of Claims than this one, and several members of the House in the debate of the Joint Resolution of May 12, 1917, expressed that opinion.

Finally, it may be proper again to advert to the fact that this Court is now asked to maintain the traditions of the United States. A denial of those traditions will signify that the declarations of American policy in the past have been merely opportunist expressions of pious wishes, not seriously intended to bind the nation. Such an inference, which the affirmance of the judgment of the Court of Claims would imply, would not only stultify our historical record, but would do the United States irreparable harm in the future, for a nation which, on momentary provocation of financial gain, casts aside its time-honored principles has, it is believed, a precarious future. Mr. Justice Field in his opinion in *Hartman* v. *Greenhow*, 102 U. S. 672 remarked:

> "There is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken."

An opportunity is now presented to affirm the national tradition or to deny it. The decision should not lightly be made.

We cannot better sum up our plea that the Court maintain the traditions of the nation and that sense of decency which heretofore has inspired its public conduct than by quoting the words of one of our fore-

most lawyers and statesmen, John Bassett Moore, who, as chairman of a recent international conference, declared that he refused to believe that the present generation would "consciously relinquish the conception that all human affairs in war and peace must be regulated by law and abandon itself to the desperate conclusion that the sense of self-restraint, which is the consummate product and essence of civilization, has finally succumbed to the passion for unregulated and indiscriminate violence."

Respectfully submitted,

KATZ & SOMMERICH,
Attorneys for Claimant-Appellant.

EDWIN M. BORCHARD,
MAXWELL C. KATZ,
OTTO C. SOMMERICH,
Of Counsel.

EXHIBIT A.

List of Vessels

Name of Owner	Names of Vessels	Fair and Reasonable Value at Time of Taking
Deutsche Dampfschifffahrts-Gesellschaft, *Hansa*,	*O. J. D. Ahlers*	3,300,000
	Ockenfels	2,000,000
	Adamsturn	1,500,000
	Liebenfels	1,200,000
	Elmshorn	1,420,000
	Bochum	1,672,000
	Esslingen	1,672,000
	Kiel	1,424,000
	Magdeburg	1,424,000
	Harburg	1,410,00
	Setos	1,672,000
	Serapis	1,672,000
Deutsch-Australische Dampfschiffs-Gesellschaft,	*Adelheid*	$840,000
	Ottawa	580,000
	Matador	360,000
	Dalbek	620,000
	Steinbek	540,000
	Indra	370,000
	Kurt	750,000
	Maia	817,600
Deutsche Dampfschifffahrts-Gesellschaft Kosmos,	*Frieda Leonhardt*	538,600
Flensburger Dampfercompagnie,	*Rudolph Blumberg*	538,600
Rhederei-Aktien-Gesellschaft von 1896,		
Carl Joh. Klingenberg & Co.,	*Portonia*	872,000
Knohr & Burchardt Nfg.,	*Hohenfelde*	934,600
	Camilla Rickmers	1,633,800
Wachsmuth & Krogmann,	*Arnoldus Vinnen*	420,000
G. J. H. Siemers & Co.,	*Clara Mennig*	502,600
Helm & Molzen,		
Adolph Leonhardt, owner of Steamship Line of Leonhardt & Blumberg,		
Dampfschiffs-Rederei *Horn* Aktien-Gesellschaft in Lubek,		
D. Fuhrmann Nissle Gunther Nfg.,		
Rickmers Rhederei Aktiengesellschaft,		
Bremer Stahlhof Aktiengesellschaft,		
Otto Zelk Dampfschiffs Rederei,		

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German Ship Cases

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WM. R. STANS

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. [illegible] RAIMUND M. HERMS COMPANY, APPELLANT, v. THE UNITED STATES

No. [illegible] THE FIRM OF M. HERMS AND M. ET AL., APPELLANTS, v. THE UNITED STATES

No. [illegible] HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT, v. THE UNITED STATES

No. [illegible] HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT, v. THE UNITED STATES

No. [illegible] ATLAS LINE SUBSIDIARY COMPANY, APPELLANT, v. THE UNITED STATES

No. [illegible] ATLAS LINE SUBSIDIARY COMPANY, APPELLANT, v. THE UNITED STATES

No. [illegible] NORTH GERMAN LLOYD, APPELLANT, v. THE UNITED STATES

No. [illegible] NORTH GERMAN LLOYD, APPELLANT, v. THE UNITED STATES

No. [illegible] NORTH GERMAN LLOYD, APPELLANT, v. THE UNITED STATES

No. [illegible] HAMBURG AMERIKANISCHE PACKETFAHRT ACTIEN GESELLSCHAFT (ALSO KNOWN AS HAMBURG-AMERICAN LINE), APPELLANT, v. THE UNITED STATES

No. [illegible] HAMBURG AMERIKANISCHE PACKETFAHRT ACTIEN GESELLSCHAFT (ALSO KNOWN AS HAMBURG-AMERICAN LINE), APPELLANT, v. THE UNITED STATES

No. [illegible] DEUTSCHE AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, APPELLANT, v. THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEFS FOR THE UNITED STATES

WASHINGTON: GOVERNMENT PRINTING OFFICE, 1925

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 102

RHEDEREI M. JEBSEN COMPANY, APPELLANT

v.

THE UNITED STATES

No. 103

THE FIRM OF M. JEBSEN, ETC., ET AL., APPELLANTS

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION IN THE COURT BELOW

The Court of Claims filed a memorandum opinion in the *Rhederei M. Jebsen Company* case (59 Ct. Cls. 402; R. 6) applying its opinion in the case of *Deutsch-Australische Dampfschiff-Gesell-*

schaft, Appellant, v. *The United States* (No. 126, October Term, 1925), which opinion is reported in 59 Ct. Cls. 450.

GROUNDS OF JURISDICTION

The judgment to be reviewed, bearing date March 17, 1924, appears at R. 6. By it the Court of Claims sustained a demurrer to the plaintiff's petition and dismissed the petition. Appeal was allowed May 19, 1924 (R. 13), under Sections 242 and 243, Judicial Code (Act of March 3, 1911, Chap. 231, 36 Stat. 1087, 1157).

STATEMENT

A stipulation is on file that No. 103 shall abide the result in No. 102.

Recovery was sought in this case (No. 102) for the value of an enemy-owned steamship, the title to which was taken over by the United States on June 30, 1917, and also for the value of the use of the steamship from April 6, 1917, the date when the United States took possession of the vessel, until June 30, 1917, the date when title was taken over.

The petition alleged that the Rhederei M. Jebsen Company was at the time of the seizure of its vessel a corporation organized under the laws of Schleswig-Holstein, Germany; that after the war it became a Danish corporation through the annexation by Denmark of Schleswig-Holstein; that on the declaration of war by the United States

against Germany, or within a few days thereafter, the steamship *Joiasse*, belonging to the appellant and then in the harbor at Manila, " was seized, held and prevented from fully departing by the United States Government, by its officers and agents," and " held and used by said Government until the title was taken over as hereinafter alleged." The petition further alleges that on June 30, 1917, the title of the vessel was taken by the United States by order of the President pursuant to the Joint Resolution of May 12, 1917, and recovery was asked upon an implied contract to pay compensation for the value of the ship at the time of taking of title, June 30, 1917, and for the value of its use from the time possession was taken by the United States until title was taken. (R. 1-3.)

JOINT RESOLUTION

The Resolution of May 12, 1917 (Chap. 13, 40 Stat. 75), is as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or

in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

ARGUMENT

Summary

I. The vessel was enemy owned and the United States had the right of a belligerent to confiscate it.

II. The Fifth Amendment, forbidding the taking of private property for public use without compensation, does not protect enemy property from confiscation.

III. The power to decide whether enemy property should be taken with or without compensation, and to

select the tribunal to award any compensation which may be allowed, rests with Congress; and the question here is whether Congress intended that compensation should be paid.

IV. That Congress, when authorizing the taking of these vessels, deliberately postponed decision on the matter of compensation is established by the following considerations:

(a) There is nothing in the terms of the Joint Resolution from which intent to compensate may be implied.

(b) Because an intent is implied to compensate citizens for their interest, it does not follow that a similar intent is to be implied in the case of enemies.

(c) The fact that the United States has advocated the policy of exempting private property of enemies from confiscation is not, under the circumstances of this case, sufficient to raise an implication of intention to pay compensation.

(d) The legislative history of the Joint Resolution of May 12, 1917, points irresistibly to the conclusion that Congress intended to postpone consideration of the question of compensation.

(e) Other legislation shows the policy of Congress to postpone until after the war decision on the matter of compensation for the private property of enemies seized during the war.

(f) The reason which gives rise to an implied promise to pay for property protected by the Fifth Amendment has no application to property taken under the belligerent right to seize and confiscate.

V. The seizure of the vessel at the outbreak of hostilities and prior to the passage of the Joint Resolution was merely preliminary to taking of title and to prevent the escape of the vessel, and does not give rise to an implied contract to pay for the temporary use or possession.

VI. Conclusion.

I

The United States has the right to confiscate the property of an enemy

The vessel was the property of an enemy and the United States had the right, if it chose to assert it, to confiscate it.

> That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. [*Brown* v. *United States*, 8 Cranch, 110, 122, 123.]

II

The Fifth Amendment does not protect private enemy property from confiscation

It is settled that the Fifth Amendment to the Constitution of the United States, providing that the United States shall not take private property for public use without compensation, does not operate to restrict the war power nor protect the property of an enemy from confiscation. *Miller* v. *United States*, 11 Wall. 268. There the Court said (pp. 304, 305):

> But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United

States, if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right.

III

The power to decide whether compensation shall be paid rests with Congress, and the question is whether Congress intended that compensation should be paid

The provision of the Constitution (Article I, Section 8) giving Congress power to declare war and to make rules for captures on land and water places in Congress the power and duty to decide whether enemy property, if seized, shall be taken with or without compensation. *Ware* v. *Hylton*, 3 Dall. 199; *Brown* v. *United States*, 8 Cranch, 110.

The question in this case is whether Congress intended compensation should be paid. There is also the question whether the Court of Claims has been given jurisdiction to entertain the claim, but the two questions are so interwoven that the answers must be the same.

There are no statutes specifically authorizing the Court of Claims to consider this claim. If it has jurisdiction, it must be under the general statute to hear claims "founded upon the Constitution of the United States or any law of Congress," or "upon any contract, express or implied, with the Government of the United States." (Section 145, Judicial Code; Act of March 3, 1911, chap. 231, 36 Stat. 1087, 1136.)

The claim is not founded on the Constitution, as the Fifth Amendment has no application.

There is no "law of Congress" specifically authorizing payment. Consequently the jurisdiction, if it exists, must rest upon the theory that the circumstances of the taking imply an intent or contract on the part of the United States to pay compensation. An implied contract to pay involves an implied intent to pay, so that, in the last analysis, whether the case turns on the question of the jurisdiction of the Court of Claims or on the question whether the national will has been exercised in favor of paying compensation, the ultimate inquiry is whether an intent to pay for these vessels is to be implied.

IV

Congress when authorizing the taking deliberately postponed decision on the matter of compensation

The argument of the appellant proceeds on the assumption that it was necessary for Congress at the time it decided to authorize the taking of the ships to then finally decide whether compensation should be paid. On this assumption it is argued that, for various reasons, Congress could not have intended to confiscate and must, consequently, have intended to pay compensation.

The more reasonable conclusion is that Congress at the time of authorizing the taking deliberately postponed decision as to compensation, which, of course, amounted to a decision that no compensation should be paid until further consideration of the subject was given and action taken by Congress.

That Congress deliberately postponed decision on this subject is established by the considerations set forth below.

(a) The terms of the Joint Resolution

There is nothing in the terms of the Joint Resolution from which an intent to pay may be implied. The Resolution authorized the seizure of ships owned in whole or in part by enemies. If owned in part by enemies and in part by citizens of the United States, the seizure of the enemy interest would be by virtue of the belligerent right to confiscate, and the seizure of the citizen's in-

terest would be under the power of eminent domain and entitle the citizen to compensation. The Resolution did not use the terms "confiscate" or "requisition." The use of one would have been inappropriate as to the interests of citizens of the United States, and the use of the other would have been inappropriate as to the interests of enemies. Congress used the broader expression "take over," which was appropriate whether or not compensation was to be made. If an inference is to be drawn from the use of this phrase, it is either that Congress intended the confiscation of enemy ships and the requisition with compensation of friendly interests, or, what is more probable, intended to postpone decision as to whether there should be confiscation or compensation to enemies.

Section 2 of the Resolution authorized an appraisal of the property and a preservation of the report of the appraisers, and made it prima facie evidence "in all proceedings on any claim for compensation." The appellant contends that this shows an intention to pay compensation. The Court of Claims answered this contention by the plausible suggestion that the section was intended to perpetuate evidence of condition and value for future use in case Congress ultimately decided to compensate enemy owners.

The provision for obtaining and preserving evidence of condition and value finds a further explanation on the face of the Resolution, which

authorized the taking of vessels in which citizens held a share, the taking of which would involve liability for compensation under the Fifth Amendment, and therefore raise an implied contract to immediately pay it, so that the provision for collecting evidence as to value and the reference to proceedings on any claim for compensation may be accounted for as intended to cover those cases in which the United States might be immediately liable to pay compensation to citizens, as well as intended to cover the case of enemy interests, in the event that Congress should ultimately decide to compensate enemy owners.

(b) An intent to compensate enemies is not to be implied because an intent to compensate citizens is implied

The appellant contends that inasmuch as the Resolution authorized the taking of ships in which citizens owned a share, an obligation or implied contract to pay citizens arose under the Fifth Amendment, and that Congress must therefore have intended the same results for enemy interests.

The main purpose of the Resolution was the seizure of enemy-owned vessels. The taking of vessels in which citizens had an interest was merely incidental, and it does not appear that the power of seizure was exercised with respect to any ship in which both enemies and citizens were owners. That an obligation would arise to pay for shares in such vessels owned by citizens is conceded. In the case of citizens' interests such an

obligation would arise because of the application of the Fifth Amendment, but the contention that the same result was intended for enemy interests—although not protected by the Fifth Amendment—involves the presumption that Congress must have intended to treat the enemies of the United States as its friends, a supposition obviously without reasonable basis.

(c) The fact that the United States has advocated the policy of exempting private property of enemies from confiscation is not sufficient basis for implying an intent to pay compensation

In a further effort to support the claim of an implied intention or contract to pay, the appellant reviews the attitude of the United States on the question of confiscation of privately owned enemy property found within a belligerent jurisdiction at the outbreak of war, showing that in dealing with this subject the nation and its public officials and statesmen have favored what Chief Justice Marshall spoke of as "the humane and wise policy of modern times," and opposed the practice of confiscating such interests. From this it is argued that Congress could not have intended to violate these precepts, and therefore an intent should be imputed to it to provide compensation.

It is true that the United States has consistently advocated this policy, but the policy has not yet been translated into law in the form of a treaty or statute.

The circumstances attending the declaration of war by the United States on April 6, 1917, and the

passage of the Joint Resolution authorizing the seizure of enemy-owned ships were unusual. In 1917 ships were as important implements of war as guns. Germany had been sinking merchant ships in violation of accepted rules of international law. The manner in which merchant vessels of neutrals and of her enemies had been destroyed by Germany was an important factor in leading us into the conflict, and the shortage in merchant tonnage that made the seizure of these vessels necessary resulted largely from Germany's destruction of merchant ships in violation of accepted rules of international law. Furthermore, to award compensation on the basis of the market value of the vessels at the time of the seizure would be to pay the German owners a fancy price in excess of cost and in excess of what it would cost to build and in excess of the prospective value of the vessels at the close of the war, when the vessels would again have become available for use by German owners, thus involving payment of an excessive price, resulting largely from Germany's own violation of international rules of conduct.

There was no reason at the time of authorizing the taking of the ships to decide the question of compensation, as German owners could not themselves have collected the compensation before the end of the war. There was also in mind the question what Germany would do by way of paying for the destruction of American merchant vessels sunk before the United States declared war, or

what she would do with respect to the payment of claims of American citizens for the illegal destruction of lives and property, and the question whether the United States should pay for vessels seized if later they should be sunk by German submarines. Many of these considerations were advanced in the debates in Congress as justifying postponement of decision with respect to matters of compensation.

These considerations and others which might be mentioned show that Congress might well have refrained from decision as to compensation and postponed consideration of the question whether any compensation should be paid and what should be the basis of compensation, and what commission or tribunal should act as the agency awarding it, if it should ultimately be decided to pay compensation.

(d) The legislative history of the Joint Resolution confirms the conclusion that Congress intended to postpone consideration of the matter of compensation for enemy property

Extensive extracts from the Journals of the House and Senate showing the legislative history of the Resolution of May 12, 1917, are found in the appendix to this brief.

When introduced in the Senate the Resolution provided that claims for compensation should be determined at the end of the war. In committee this was stricken out, and when reported to the Senate the Resolution contained elaborate provisions respecting compensation, including provision

that in the case of enemy interests the Court of Claims was authorized to report the facts back to Congress but not to award compensation. Debate followed, in which objection was made to making any present provision for compensation to enemies. The statement was made:

> On the question as to whether the owners of these vessels should be paid the value of the vessels, I think it is a question that ought to be determined in the future. The German Government sank our ships on the high seas when we were a neutral power, and I have heard nothing to indicate that they are prepared to pay American citizens for the sinking of those ships the value of those ships; and when we have German vessels in our hands, as far as I am concerned, I am not disposed to pay the citizens of Germany the value of that property until they are prepared to pay our citizens the value of the property they have destroyed. [Cong. Rec., 65th Cong., 1st Sess., vol. 55, pt. 2, pp. 1572, 1573.]

As a result of this debate, the Resolution was amended by striking out all the sections dealing with compensation, the plain purpose being to postpone decision on that subject.

The extracts from the debates in the House of Representatives cited by appellant demonstrate the wisdom of the rule that individual expressions of opinion by members of Congress are not reliable guides to the intention of the majority.

Taken as a whole, the material from the Congressional Record found in the appendix to this brief leads irresistibly to the conclusion that Congress deliberately refused to make any immediate provision for compensation and left open for future consideration the question whether and under what conditions compensation should be paid to enemies for these vessels.

(e) Other legislation shows the policy of Congress to postpone for future consideration the matter of compensation for enemy property

The Trading with the Enemy Act, passed after the Resolution of May 12, 1917, authorized the seizure of enemy property of kinds not so directly useful for war purposes as vessels, and postponed decision as to whether the property should be returned to the owners or whether the enemy owners should be compensated. (Act of October 6, 1917, Chap. 106, 40 Stat. 411.)

(f) The reasons which give rise to an implied contract to pay for property protected by the Fifth Amendment have no application to property taken from enemies

An intent to pay, and consequently a promise or contract to pay, for property taken for public use has been implied in cases where the owners were protected by the Fifth Amendment, because of the constitutional obligation to pay.

United States v. *Great Falls Mfg. Co.*, 112 U. S. 645.
Schillinger v. *United States*, 155 U. S. 163.
Bigby v. *United States*, 188 U. S. 400.
Tempel v. *United States*, 248 U. S. 121.

In *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, the Court said (pp. 235, 236):

> When it takes property under such circumstances for an authorized governmental use it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this court and *arises because of the constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States,* guaranteeing the owner of property against its appropriation for a governmental use without compensation. [Italics ours.]

An intent or contract to pay for enemy property seized under the war power has never been implied in any adjudicated case in the United States.

Juragua Iron Co. v. *United States,* 212 U. S. 297.
Herrera v. *United States,* 222 U. S. 558.
Hijo v. *United States,* 194 U. S. 315.
Castelo v. *United States,* 51 Ct. Cls. 221.

This Court has often held that the taking of property by the United States under a claim of ownership is no basis for implying an intent to pay compensation because the assertion of the right to take property as its own is an assertion of the right to take property without paying anything for it and negatives any intent to pay. A case where the United States seizes property under the war power with the right to take the property without any compensation is analogous, because in

the latter case the Government, in taking, is asserting a right to take without payment.

It is doubted whether a *contract* to pay exists even though there be a declared intention to pay for seized enemy property, because the Government in such case has the absolute right to take without compensation, and payment of compensation is a mere gratuity or bounty based only on a sense of justice and fairness.

V

As no implied promise arose to pay for the taking of the title, there is no reason to imply an intent to pay for temporary possession

While the main question is whether an implied contract arose to pay the value of the ship taken pursuant to the Joint Resolution of May 12, 1917, it is also urged by the appellant that an intent is to be implied to pay for the use of the vessel prior to the time the title was taken. Possession was taken immediately on the outbreak of the war, April 6, 1917. For all that appears from the petition the seizure of the vessel at the outbreak of hostilities was merely preliminary to the ultimate taking of the title and to prevent its removal or injury until such time as formal authority could be obtained from Congress to take over the title. If this was the purpose of the seizure or possession, there would be no reason to imply any intent to pay for this temporary use or possession if there was no intent to pay the value on the taking

of title. No statute is cited by appellant giving authority to seize the vessel prior to the passage of the Joint Resolution of May 12, 1917. This preliminary seizure or possession may, however, be said to have been authorized by the Act of August 29, 1916 (Chap. 418, 39 Stat. 619, 645), which provided that—

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

There is nothing in the terms of the Act of August 29, 1916, to show that Congress intended to surrender the right of a belligerent to seize enemy property without compensation. This subject is more fully dealt with in the brief in No. 112, *North German Lloyd, Appellant,* v. *The United States.* No intent or contract to pay compensation for the use before acquisition of the title is to be implied from the circumstances of the taking.

CONCLUSION

The correct rule, deducible from the trend of judicial decisions and legislative treatment of this subject, and applicable to this and similar cases, is

that when property of an enemy is seized by the United States under the war power, and with the admitted belligerent right of confiscation, a court should not award compensation to the enemy owners unless Congress, in the exercise of its exclusive power to declare the national will with respect to captures of enemy property, has expressly or by *necessary* implication directed that compensation should be paid, fixed the measure of it, and appointed the court as the agency for making the award. There was in the present case no express direction by Congress to pay compensation to enemy owners, and there was nothing in the Joint Resolution or the circumstances attending its passage from which an intent to compensate, or to direct the courts to award compensation, is necesssarily implied.

Applied to the present case, these principles should result in an affirmance of the judgment of the court below.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

No. 108. HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT, v. THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 108

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION Company, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION IN THE COURT BELOW

The memorandum opinion of the Court of Claims, adopting the opinion in the case of *Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant,* v. *The United States* (No. 126, October Term, 1925), is reported in 59 Ct. Cls. 461, and is found at page 12 of the Record.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered by the Court of Claims March 17, 1924 (R. 12), sustaining a demurrer to and dismissing the petition.

Appeal was allowed June 16, 1924 (R. 20), under Sections 242 and 243, Judicial Code.

STATEMENT

In this case recovery is sought by a New Jersey corporation, all of the stock of which was owned by an enemy corporation, for the value of the use of piers and terminal properties, possession of which was taken and held by the United States for the period from April 6, 1917, to June 28, 1918, for which it is alleged no compensation has ever been paid. Recovery is also sought for interest on the amount of an award of compensation for the taking of the title from the date of acquisition of title by the United States, June 28, 1918, to the date of payment of the award, January 5, 1919. The most important question in the case is whether a domestic corporation, all of whose stock is owned by an enemy corporation, is entitled to the same treatment as a citizen, or whether its property is properly considered enemy property.

The petition in this case alleged that plaintiff was and is a New Jersey corporation organized in 1899 (R. 1), and that it is and always has been a subsidiary of the Hamburg-American Line, a German corporation, and that all of its issued stock is and always has been owned by the Hamburg-American Line (R. 1); that the outstanding shares of stock of the terminal company held by the Hamburg-American Line were in December, 1917, seized and taken over by the Alien Property Cus-

todian under the Trading with the Enemy Act, and that the present officers and directors of the terminal company were placed in office through the voting power of the Alien Property Custodian (R. 1–2). It is alleged that the terminal company owned wharves, docks, and piers in Hoboken; that on April 6, 1917, the United States entered upon this property, and on April 20, 1917, made its entry exclusive by ejecting the terminal company, and from April 20, 1917, until the United States acquired title to the property on June 28, 1918, the Secretary of War, under the direction of the President and pursuant to the Act of August 29, 1916, retained its use and possession. (R. 2.) The petition further alleges the acquisition of title to the property by the United States on June 28, 1918, by proclamation of the President under the Act of March 28, 1918, and the award of compensation of the value as of June 28, 1918, and the payment of that compensation on January 5, 1919. (R. 2–3.) It is alleged that no compensation for the use of the property was paid for the period from April 6, 1917, to June 28, 1918. (R. 3.) There is no allegation that the award by the President of December 3, 1918, did not include interest from June 28th to December 3d. (R. 3.) As to the amount found as the value on June 28th (R. 3), the petition assumes, without any allegation to that effect, that the compensation awarded by the President was the value as of June 28th, and was without

any allowance for the delay in payment of the award. The relief sought is the value of the *use* from April 6, 1917, to June 28, 1918, and interest on the amount awarded for the *title* to the property for the period from June 28th, the date of the taking, to January 5, 1919, the date of the payment of the award. (R. 4.)

THE STATUTE

The Act of August 29, 1916, under which the possession was held prior to the taking of title, is quoted at length on page 66 in the brief in No. 112. The Act of March 28, 1918, authorizing the taking of title to this property, and the proclamations of June 28, 1918, taking the title, and of December 3, 1918, awarding compensation, are found in the brief in No. 112 on pages 67–72. The proclamations in question dealt with the property of the North German Lloyd Dock Company and of the Hamburg-American Line Terminal & Navigation Company. Schedule A, attached to the proclamation of December 3, 1918, contains the following (40 Stat. 1914, 1916):

> To the Hamburg-American Line Terminal & Navigation Company, a corporation of the State of New Jersey, the sum of two million three hundred fourteen thousand eight hundred and seventy-seven dollars ($2,314,877), to be paid to said Hamburg-American Line Terminal & Navigation Company upon the satisfaction of record of all liens by way of mortgage, judgment or otherwise existing

on, and all taxes and assessments due and exigible upon the foregoing premises, or any part thereof, on the 28th day of June, 1918.

THE QUESTIONS

One question is whether the docks and piers belonging to a New Jersey corporation whose stock was owned by an enemy were enemy property or whether the claimant is entitled to the same treatment as a citizen and to compensation on an implied contract for the value of the use of the property from April 6, 1917, to June 28, 1918.

The other question is whether compensation awarded by the President for the taking of title to the property was adequate and just compensation, and if not, whether any officer or tribunal other than the President has power to make an award or correct the award made by the President.

ARGUMENT

Summary

I. Congress has adopted the policy of determining the status of corporations as enemy or not without regard to the nationality of their stockholders, and the United States admits error in the decision of the Court of Claims in so far as it held that the property of a New Jersey corporation was enemy owned because all its stock was enemy owned.

II. As the appellant is to be dealt with as a citizen of the United States, notwithstanding its stock was enemy owned, then upon the taking of the use of its property a contract to pay just compensation for that use was implied.

III. With respect to the claim for compensation for the use of the property from April 6, 1917, to the date

title was taken, June 28, 1918, an implied contract to pay compensation is admitted.

IV. The claim for interest on the award of compensation for the taking of the title must fail because there is nothing on the face of the award or in the petition to indicate that any item of just compensation was omitted.

V. Conclusion. The United States concedes that the judgment should be reversed and compensation awarded for the use of the property from April 6, 1917, to June 28, 1918.

I

The property of a New Jersey corporation was not enemy owned because all its shares of stock were enemy owned

The important fact in this case is that the property in question belonged to a New Jersey corporation all of the outstanding stock of which was owned by an enemy corporation, and at the outset the question arises whether the property of the New Jersey corporation was enemy owned and subject to confiscation or whether the corporation was entitled to the protection of the Fifth Amendment as a citizen, or whether, at least, *it was intended by Congress that it should be accorded the same treatment as a citizen.*

The Government contended in the court below that the property of the New Jersey corporation should be treated as the property of an enemy because all the issued stock of the New Jersey corporation belonged to an enemy corporation. The Court of Claims evidently accepted this view, and in a brief memorandum opinion (R. 12) bases its

decision on the opinion in No. 126, *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *The United States,* which involves property admittedly owned by an enemy. The authorities cited by the Government below in support of this view are certain English prize cases.

In the case of the *St. Tudno,* Lloyd's Reports of Prize Cases, Vol. V, p. 198, the following appears:

> A steamship [the *St. Tudno*] of which the registered owners were a British company, was before the war used as a tender at Southampton to the vessels of the Hamburg-Amerika Linie. She had been bought in 1912 by the Hamburg-Amerika Linie, who caused her to be transferred to the British company, by whom she was in form chartered for five years to the Hamburg-Amerika Linie. All the shareholders were nominees of the Hamburg-Amerika Linie, who appointed the directors, gave them their qualifications, and took from them blank transfers of their qualifying shares, and an agreement to conform to the instructions of the Hamburg-Amerika Linie and account to the latter for all dividends. Soon after the outbreak of war the vessel was requisitioned as a British ship by the Admiralty, in whose employment she was at the time of seizure.
>
> *Held* that even if all the circumstances had been known to the Admiralty (which they were not), the fact that she was under requisition was immaterial, that the beneficial ownership was vested in the Ham-

burg-Amerika Linie, and that she must be regarded as enemy property * * *. [Pp. 198–199.]

The court, speaking through the President, says:

> In this case the Crown asks for the condemnation of a paddle steamer, the *Saint Tudno,* which up to the time of the outbreak of war between this country and Germany, was at all material times used as a tender in or about Southampton for the liners of the Hamburg-Amerika Linie. The claim of the Crown is grounded on the contention that this steamer was enemy property, and that is the question which I have to determine in this case.
>
> * * * * *
>
> The steamship belonged nominally to a British company registered in this country. In my opinion, in this Court of Prize, I have a right to look, and am bound to look, at something beyond the nominal ownership. The British company had, I think, three British directors and some British shareholders; but the documents which are now before me show clearly what the position of those directors, as directors, was, and what the position of those gentlemen as shareholders was. [Pp. 204–205.]
>
> * * * * *
>
> Now, apart from technicalities, could anybody say that this ship belonged to a British company? If it did in name belong to a British company, that covering was the

> merest thinnest shell, and I must break through it, as I do break through it, in order to ascertain who the real owners of the ship were. There can be no doubt that the real owners are the Hamburg-Amerika Linie; and if the ship earned during the period of war (as it has earned up till now) considerable sums, all those sums would have to be accounted for to that enemy company. [Pp. 207–208.]

The same doctrine is stated in the case of the *Michigan* (Lloyd's Reports of Prize Cases, Vol. V, p. 421):

> All the shares in a company registered in Great Britain were held by a German corporation, except six registered in the names of the directors and secretary of the company, all German subjects, and of a French employee of the corporation, resident before the war in Germany.
>
> *Held* that goods belonging to the British company were liable to be condemned as enemy property.

The judgment concludes with the following words (p. 423):

> I hold that this company for all purposes affecting this case must be regarded as an enemy company, although carrying on business here, and the property must be condemned as enemy property.

In the case of *Daimler Company (Limited)* v. *Continental Tyre and Rubber Company (Great*

Britain) (*Limited*), decided in the House of Lords June 30, 1916, 2 A. C. (1916) 307 (Times Law Reports, Vol. XXXII, pp. 624, 626), Lord Halsbury uses the following language (p. 316):

> The limited liability was a very useful introduction into our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefits of that institution, but it seems to me too monstrous to suppose that for an unlawful, because, after a declaration of war, a hostile, purpose the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English Court of justice.

I do not feel able to support the propositions announced in these English cases as decisive of this case. It is not necessary to go as far as to cast any doubt on the power of Congress to provide that property of a domestic corporation shall be treated as enemy owned where all of the stock of the domestic corporation is owned by an enemy. Where, however, Congress has not seen fit to adopt the policy of treating the property of domestic corporations as the property of enemies, though all of the stock of the corporations be owned by enemies, and has evidenced an intention that the property of such corporations shall be dealt with as the property of citizens, it would cause great

confusion if the courts should disregard this method of treatment and adopt a different rule.

For very practical reasons and to avoid confusion in the application of laws dealing with enemy property, Congress has adopted the policy of treating the property of domestic corporations as not enemy property, without regard to enemy ownership of its stock, and has preferred the method of seizing the shares of stock as enemy owned rather than treating the property of the corporation as enemy owned.

The Joint Resolution of May 12, 1917, which authorized the President to take over the title of vessels "owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war," dealt with corporations and established, as the test of enemy ownership in the case of property owned by corporations, the fact that the corporation was a corporation of a nation with which the United States was at war. In the Trading with the Enemy Act, approved October 6, 1917, chap. 106 (40 Stat. 411), in Section 2, subdivision (a), an enemy was defined as including "any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

In *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, the Court held that under that Act the status of a

corporation was not fixed by the nationality of its stockholders, and said (p. 472):

> Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2 A. C. [1916] 307 * * *.

The Act of March 28, 1918 (Chap. 28, 40 Stat. 459), and the Proclamations of the President under it, by virtue of which the title to this dock property was taken, proceed on the theory that the domestic corporations were not enemies and their property was not enemy owned, regardless of the fact that all of the issued stock of the domestic corporations was enemy owned. In dealing with corporations Congress definitely adopted the policy of disregarding stock ownership as a test of enemy character, and in dealing with domestic corporations, whose stock was owned by enemies of the United States, has proceeded on this theory and it has been the enemy-owned stock which has been seized, and in this very case it appears from the petition that the stock of the terminal company formerly owned by the Hamburg-American Line, an enemy corporation, was seized by the Alien Property Custodian in December, 1917. (R. 1.)

II

Notwithstanding the corporation's shares were enemy owned, an implied contract arose to pay just compensation for the use of its property

Even though Congress has power to treat as enemy property, unprotected by the Fifth Amendment, the property of a domestic corporation because of enemy ownership of *all* of its stock, if it has chosen not to do so and has shown an intention that such corporations should not be treated as enemies, then it must be conceded that in the taking of the use of the property of such a corporation under the Act of August 29, 1916, an intent, and consequently a contract, may be implied to pay compensation for that use, and the taking in such a case should raise the same implications as to compensation as if the property were in fact protected by the Fifth Amendment. The implication of an intent or contract to pay compensation in such a case may not be based on the fact that the ownership of the property is actually protected by the Fifth Amendment, but on the evident intent of Congress that the owner should be treated as if his property were protected by the Fifth Amendment.

III

An implied contract is admitted to pay for the use of the property of a New Jersey corporation taken under the Act of August 29, 1916

With respect, therefore, to the claim for value of the use of the property from April 6, 1917, to

June 28, 1918, a use taken on the authority of the Act of August 29, 1916, if the corporation is to be treated as a citizen and not as an enemy, an intent or contract to pay the value of the use of the property during that period would be implied, and as there is an allegation that no compensation was paid for that use the petition, in this view of the case, stated a cause of action. The Act of March 28, 1918, authorizing the taking of the titles to docks and piers, is not susceptible of the interpretation that it authorized compensation for anything more than was taken under it and subsequent to its passage.

IV

The claim for interest on the award must be rejected

With respect to interest on the amount of the award from June 28th, 1918, the date of taking the title, to January 5, 1919, the date of the payment, there is nothing to show that in determining compensation the President did not take into account the delay, past and prospective, in making payment, or that he did not make the amount of the award sufficient to cover the use of the money from the date of the taking to the date of payment. The award on its face does not show that any item necessarily a part of just compensation was omitted, and the petition does not allege that there was any omission, nor does it state any facts to justify the

assertion that the amount of the award was the value as of June 28th without any addition for the use of the money after that date, or for the delay in payment.

CONCLUSION

While the petition does not state a cause of action for interest on the award, it does state a cause of action for the reasonable value of the use of the pier property prior to the taking of title on the theory that the claimant corporation was entitled to the same treatment as a citizen. If the Court agrees with the court below and the English cases on this subject, the judgment should be affirmed; but if the views expressed in this brief are adopted, the judgment should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

No. 109. HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION CO., APPELLANT, v. THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 109

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION Company, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION IN THE COURT BELOW

The memorandum opinion of the Court of Claims, adopting the opinion in *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *The United States* (No. 126), is found at page 12 of the Record and is reported in 59 Ct. Cls. 461.

GROUNDS OF JURISDICTION

The judgment to be reviewed, entered March 17, 1924, by the Court of Claims, appears at R. 12. By it the Court of Claims sustained a demurrer to the petition and dismissed it. Appeal was allowed June 16, 1924 (R. 20), under Sections 242 and 243, Judicial Code.

STATEMENT

Recovery in this case is sought for the value of tugs, barges, and other craft, possession and control of which (but not title) were taken by the United States on April 17, 1917, under authority of the Act of August 29, 1916. The case is like No. 108, *Hamburg-American Line Terminal & Navigation Company* v. *The United States*, in that the claimant was and is a New Jersey corporation all of whose outstanding shares of stock at the time of the seizure complained of were owned by the Hamburg-American Line, a German company, the stock having in December, 1917, been acquired by the Alien Property Custodian. (R. 1.) The authority for the seizure is the Act of August 29, 1916 (R. 3), authorizing the President to take over the possession and use of, but not the title to, transportation systems. The claimant alleges the value of the property at the time of taking and asks judgment for the value, but makes no allegation as to the value of the *use*, and the prayer for relief does not ask for the value of the use.

ARGUMENT

Summary

I. The appellant, a New Jersey corporation, is to be treated as a citizen and not as an enemy, although all its stock was enemy owned.

II. For whatever interest in its property was taken for public use an implied contract to pay compensation is admitted.

III. The petition shows that only the possession and control of its property were taken, not the title or full ownership, and the Act of August 29, 1916, under which it is alleged possession was taken, authorized only the taking of temporary possession and use and not complete ownership.

IV. The petition therefore states a cause of action only for recovery of the value of the use.

V. It is admitted that the judgment should be reversed.

Admitting, as in No. 108, that the terminal company, a New Jersey corporation, is to be treated as a citizen and not as an enemy, and that from the taking of its property by the United States an intent or contract is to be implied to pay compensation, and that the same implications arose in favor of the company as arise on the taking of the property of a citizen for public use, it would follow that for the *use* of any property taken from this corporation under authority of the Act of August 29, 1916, an implied promise arose to pay compensation. The Act of August 29, 1916, is, according to the petition, the statute under which officials of the United States took possession of these vessels.

The Act authorized the President to "take possession and assume control" of any system of transportation, or part thereof, and "to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon" for certain purposes. There is nothing in the Act authorizing the taking of title, and under it the right to hold possession ended on the termination of the war.

All that ought to have been taken, or could have been taken, under this Act was possession and use, and not entire ownership. While the petition alleges that on April 6, 1917, the property was "requisitioned or commandeered" (R. 3), it goes on to say with more particularity that on April 17, 1917, it was turned over to the Depot Quartermaster Corps, the Secretary of War, "upon directions from the President, pursuant to the Act of Congress of August 29, 1916," having ordered that the Depot Quartermaster should take "possession and assume control thereof." The Joint Resolution of May 12, 1917, authorized taking over title only of vessels in whole or in part enemy owned. The petition therefore stated no cause of action for compensation for the taking of the title, but only for the value of the use.

The petition does not state the value of the use, and thus states a cause of action for recovery of only nominal compensation; but as a just claim for compensation for use is pleaded, judgment should be reversed if the Court adopts the view expressed in this brief and in the brief in No. 108, that the claimant is entitled to the same treatment as a citizen. If the view announced in the English cases and by the court below is adopted, the judgment should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

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THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION IN THE COURT BELOW

The memorandum opinion of the Court of Claims, adopting the opinion in the *Deutsch-Australische Dampfschiffs-Gesellschaft case* (No. 126) is found at R. 12, and is reported in 59 Ct. Cls. 974.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered March 17, 1924. (R. 12.) By it the Court of Claims sustained a demurrer to and dismissed the petition. Appeal was allowed June 16, 1924 (R. 19), under Sections 242 and 243, Judicial Code.

STATEMENT

The Atlas Line Steamship Company was and is a New Jersey corporation, all of its outstanding

shares of stock being owned by the Hamburg-American Line, a German corporation, until the stock was taken by the Alien Property Custodian in December, 1917. (R. 1.) Recovery in this case is sought for the value of three barges which it is alleged the United States took possession of in April, 1917, under direction of the President pursuant to the Act of August 29, 1916, and the title to which it is alleged the United States acquired on June 30, 1917, under authority of the Joint Resolution of May 12, 1917. (R. 2.) The relief prayed for is judgment for the value in April, 1917, plus interest on that value.

The barges had been the property of the Atlas Company since 1913. (R. 2.) The Atlas Company had been a subsidiary of the Hamburg-American Line for many years. It is alleged in the petition that on April 6, 1917, the United States, by the Treasury Department, acting through customs officers, "requisitioned" the barges (R. 2), and on April 16, 1917, the Secretary of War, "upon directions from the President, pursuant to the Act of Congress of August 29, 1916," ordered the Depot Quartermaster to "take possession and assume control thereof," and on June 30, 1917, by Executive Order pursuant to the Joint Resolution of May 12, 1917, the title was taken over by the United States. It appears that the taking of possession occurred on April 16, 1917. Recovery is sought for the value of the

barges as of April 6, 1917, and interest thereon until paid.

ARGUMENT

Summary

I. The appellant, a New Jersey corporation, is to be considered a citizen and its property not enemy property, although its shares of stock were enemy owned.

II. The Act of August 29, 1916, under which possession of the barges was taken, authorized taking possession and use, but not title and ownership.

III. The Joint Resolution of May 12, 1917, authorized the taking of title only of vessels owned in whole or in part by enemies.

IV. The petition therefore states a cause of action, but only for the value of the possession and use.

V. The United States concedes that the judgment should be reversed to allow recovery of the value of the use.

If the position taken in No. 108 is correct, the Atlas Company is to be considered a citizen and its property not enemy property, and on that basis an intent or contract could be implied to pay for whatever property was taken by the United States under authority of law. Recovery is sought for the value of the property, on the theory that the title and ownership were taken by the United States. The Act of August 29, 1916, did not authorize any official of the United States to take title, but only the use during the war of transportation systems or parts thereof. The Joint Resolution of May 12, 1917, authorizing the taking of vessels limited the authority to those owned in whole or in part by enemies or flying the enemy flag or under enemy register. As these barges be-

longed to a domestic company, there was no authority under the Joint Resolution of May 12, 1917, for taking over title and ownership. With respect to vessels owned by corporations, the Joint Resolution of May 12, 1917, expressly limited the authority granted to the taking of vessels owned by "corporations of any nations with which the United States may be at war." No statutory authority has been pointed out for the taking of the title, and if such a taking of title was attempted it was unauthorized and ineffective, and constituted a tort of which the Court of Claims has no jurisdiction. (Section 145, Judicial Code.) The taking of possession and use during the war seems to have been authorized by the Act of August 29, 1916, and the petition seems to state a cause of action on an implied contract to pay the reasonable value of the use of the barges—at least until the end of the war—and although the value of that use is not alleged and a recovery on the basis of this petition might be limited to one cent, that is a situation curable by amendment.

If the Court agrees with the position taken in the brief in No. 108, that this domestic corporation is entitled to the same treatment as a citizen in the matter of compensation for its property taken for public use, the judgment should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

No. 111. ATLAS LINE STEAMSHIP COMPANY, APPELLANT, v. THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 111

ATLAS LINE STEAMSHIP COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION IN THE COURT BELOW

The memorandum opinion of the Court of Claims, adopting the opinion in the *Deutsch-Australische Dampfschiffs-Gesellschaft case* (No. 126), is found at R. 16, and is reported in 59 Ct. Cls. 461.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered March 17, 1924. (R. 16.) By it the Court of Claims sustained a demurrer to and dismissed the petition. An appeal was allowed June 16, 1924 (R. 23), under authority of Sections 242 and 243, Judicial Code.

STATEMENT

The claimant, the Atlas Line Steamship Company, is a New Jersey corporation all of the outstanding stock of which since its organization in 1903 was owned by the Hamburg-American Line, a German corporation, until the stock was seized by the Alien Property Custodian in December, 1917. The suit is for the value of five vessels, title to which was taken by the United States, one by an Executive Order of May 22, 1917, and four by Executive Order of June 30, 1917, under authority of the Joint Resolution of May 12, 1917, authorizing the seizure of vessels owned by enemies, or flying the enemy flag, or under enemy register. The case differs radically from those heretofore considered (Nos. 108, 109, 110) in that prior to April 2, 1917, these vessels belonged to the Hamburg-American Line, a German corporation, and were then and continued to be until their seizure under German registry. On April 2, 1917, a month after diplomatic relations between the United States and Germany were severed, and only four days before the formal declaration of war, and when it was common knowledge that war was inevitable, the parent company, the Hamburg-American Line, executed and delivered to the New Jersey corporation, the Atlas Line Steamship Company, a bill of sale to the vessels for a recited consideration of $2,250,000, which was represented by a promissory note for that amount

given by the subsidiary and payable in one year, and secured by a chattel mortgage on the vessels. *The registry of the vessels was not changed.* (R. 2.)

The statute involved is the Joint Resolution of May 12, 1917, quoted at length in the brief in No. 102, at page 3.

THE QUESTIONS

The questions involved are whether the vessels were enemy owned or had the status of enemy vessels at the time of seizure, and if so, whether there was any implied contract to pay compensation.

ARGUMENT

Summary

I. The ships remained under German flag and registry, and therefore had the status of enemy vessels, without regard to the nationality of the owner.

II. The Joint Resolution of May 12, 1917, authorized the seizure of vessels flying the enemy flag or under enemy registry.

III. For the reasons disclosed in the brief in No. 102, Rhederei M. Jebsen Company v. The United States, no implied contract arose to pay compensation for enemy vessels seized under the Joint Resolution of May 12, 1917.

IV. An additional reason for considering these vessels to be enemy owned is found in the colorable and fictitious character of the sale from a German corporation to an American corporation (a subsidiary of the German corporation) four days before the declaration of war.

If these vessels had been under American flag and registry at the time of seizure and had been,

as in No. 110, the property of the Atlas Company, a New Jersey corporation, acquired and held in good faith long before the outbreak of the war, it might be concluded, as in No. 110, that the Atlas Company would be entitled to the same treatment as a citizen owner, notwithstanding it was a subsidiary of and all its stock was owned by an enemy corporation. The case differs, however, from No. 110 in two important respects: First, the ships remained under German registry; second, the facts alleged raise a presumption that the transfer from the Hamburg-American Line to the Atlas Company was not a transfer in good faith but a colorable arrangement, leaving the German corporation the beneficial owner. The fact that the vessels remained under German flag and German registry left them with the status of enemy vessels subject to seizure and confiscation as enemy property without regard to actual ownership.

That registry of vessels may be made the test of nationality is established.

Oppenheim, Int. Law, I, page 317, says:

> All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship papers—

and among them is—

> An official voucher authorizing the vessel to sail under its flag. This voucher consists of a Certificate of Registry, etc.

In *The Mohawk*, 3 Wall. 566, 571, it was said:

> The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found.

The Joint Resolution of May 12, 1917, authorized the seizure of vessels "flying the flag" or "under register" of any nation with which the United States was at war.

Notwithstanding these ships may not have been eligible to registry under the laws of the United States, although owned by a citizen of the United States, Congress was following a recognized rule of international law in making registry the test of nationality.

This proposition alone disposes of the case, with the application of the principles contended for in the brief in No. 102, *Rhederei M. Jebsen Company* v. *The United States*.

An additional reason for affirming the judgment is found in the fact that the transfer was colorable. While the case was decided on demurrer to the petition, and although the petition alleges in one place that the vessels were owned by the Atlas Company at the time of seizure, the details of the transaction by which that alleged ownership was acquired are stated in the complaint and they give rise to the presumption that the sale was a colorable one and the German company remained the real owner. If the case had been tried and

the evidence coincided with the allegations in the complaint with respect to the circumstances of the acquisition of ownership, the court would have been bound to find as a matter of law that the sale was a sham. Sales by enemies to neutrals *flagrante bello* are "severely scrutinized" and "liable to great suspicion."

In the case of *The Benito Estenger*, 176 U. S. 568, at page 578, this Court, quoting from Hall, International Law (4th ed.), 525, said:

> "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war."

The same principles are applicable to the case of a transfer from a prospective enemy to a citizen on the eve of war, when its declaration is commonly understood to be inevitable. In the case of *Stoehr* v. *Wallace*, 255 U. S. 239, the matter involved was the sale of enemy-owned shares in a corporation to an American citizen, which sale was

made on February 20, 1917, and in contemplation of war and to avoid its consequences. The Court said (at page 251):

> The District Court, after reviewing the proofs at length, concluded that the contract was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid inconveniences which otherwise might ensue from a state of war; and that the parties intended to leave the beneficial ownership in the German corporation and not to pass it to the New York corporation. We reach the same conclusion. On no other theory can the acts of those who were concerned be explained or their declarations reconciled. The mere recitation of the facts makes this so plain that we refrain from any special discussion of them.

In the present case the pretended sale occurred four days before the declaration of war, and when war was inevitable. The price stated was $2,250,000—$1,540,000 less than the value of the vessels as alleged in the petition and for which recovery is sought. Not one cent of the purchase price was paid, but a promissory note for the full amount, due in one year, was given. The Atlas Company evidently had no liquid resources sufficient to finance the purchase, as a chattel mortgage was taken on the vessels to secure the purchase price.

No reason whatever appears for the transaction except the purpose to prevent seizure on the outbreak of war. Through its ownership of all of the stock in the Atlas Company and its complete control of that company, the vendor had, with respect to each of these vessels, the "power of revocation, or a right to its restoration at the conclusion of the war," to use the language approved by this Court in *The Benito Estenger case.*

The property being subject to seizure and confiscation as enemy property, the case is disposed of on the principles applied in the case of *Rhederei M. Jebsen Company* v. *The United States,* No. 102. There being no intent or contract implied to pay compensation to enemy interests seized under the authority of the Joint Resolution of May 12, 1917, the judgment should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

No. 112. NORTH GERMAN LLOYD, APPELLANT, v. THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 112

NORTH GERMAN LLOYD, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION IN THE COURT BELOW

The memorandum opinion of the Court of Claims, adopting the opinion in the *Deutsch-Australische Dampfschiffs-Gesellschaft case* (No. 126), is found at R. 5, and reported in 59 Ct. Cls. 460.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered March 17, 1924 (R. 5). By it the Court of Claims sustained a demurrer to and dismissed the petition. Appeal was allowed June 16, 1924 (R. 13), under Sections 242 and 243, Judicial Code.

STATEMENT

In this case recovery is sought by the enemy lessee of certain docks, piers, and warehouses at Hoboken, for the value of the use of the property from April 6, 1917, until June 28, 1918, during which period the United States is alleged to have held possession, June 28th being the date as of which the United States acquired title to the property under the Act of March 28, 1918. Recovery is also sought for the value of the use of the premises from June 28, 1918, the date as of which title was acquired by the United States, until December 3, 1918, the date on which the award of compensation for the title was made, or, in lieu thereof, for interest on the award for that period.

The North German Lloyd Dock Company, a New Jersey corporation, had no interest in the possession of the property, having leased it to the German corporation, and the Dock Company was awarded $1.00 for its reversion, with which it appears to be satisfied, as it is not here claiming additional compensation.

The petition alleges that the North German Lloyd was and is a German corporation; that the North German Lloyd Dock Company was and is a New Jersey corporation (R. 1) all of the stock of which was during the periods mentioned in the petition owned by the German corporation (R. 2); that in 1900 the German corporation being then the owner of certain lands on the Hudson

River in the City of Hoboken, New Jersey, conveyed the lands to the New Jersey corporation, which built piers and warehouses thereon, $2,000,000 of the cost of which was provided by mortgage made by the Dock Company and the remainder by funds advanced by North German Lloyd, the German corporation; that in March, 1903, the Dock Company leased the lands and piers to the German corporation for a term of 999 years; that on April 6, 1917, the property was entered upon by the military forces of the United States, without, however, excluding claimant; that on April 20, 1917, possession was seized by the United States under the Act of August 29, 1916, authorizing the President in time of war to take possession of transportation systems (R. 2); that on June 28, 1918, the title and ownership were taken over by the United States by proclamation of the President pursuant to the Act of March 28, 1918, which specifically authorized the acquisition of terminal properties and docks of the North German Lloyd Dock Company and directed that compensation be paid (R. 3); that on December 3, 1918, the United States, acting through the President and under authority of the Act of March 28, 1918, "awarded compensation for the title of said premises and property by it expropriated as aforesaid." It is then alleged that no compensation has been awarded "for the use of said premises and property from the date of the original taking of possession and use thereof by the United States of

America, namely, April 6, 1917, to the date that the same was expropriated and title thereto taken by the United States of America, namely, June 28, 1918; nor for the period from the last-mentioned date to the date of the award of compensation for the taking of title, namely, December 3, 1918." Then follow allegations as to the reasonable value of the use of the premises from April 6, 1917, to June 28, 1918, and from June 28, 1918, to December 3, 1918, with a prayer for relief asking for value of the use from April 6, 1917, to June 28, 1918, and also for the period from June 28, 1918, to December 3, 1918, or, if the value of the use for the last-mentioned period be not awarded, then for interest for that period on the sum awarded December 3, 1918, as compensation for the taking of title (R. 3).

STATUTES AND PROCLAMATIONS

The statute under which possession was taken and held from April 6, 1917, to June 28, 1918, is the Act of August 29, 1916, chap. 418 (39 Stat. 619, 645), which is as follows:

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes con-

nected with the emergency as may be needful or desirable.

The Act of March 28, 1918, chap. 28 (40 Stat. 459), authorizing the expropriation of title to this dock property, is quoted in two proclamations of the President, one expropriating title and the other awarding compensation for the title. The first proclamation, dated June 28, 1918 (40 Stat. 1804), is as follows:

> *Whereas* the Act of Congress making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public—No. 109—65th Congress), contains the following provisions:
>
> "The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: *Provided,* That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just

compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States: *Provided further,* That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired."

Now, therefore, I, Woodrow Wilson, President of the United States of America, pursuant to the authority vested in me by the said Act of Congress approved March 28, 1918, do hereby determine and declare that the acquisition of title to the foregoing docks, piers, warehouses, wharves, and terminal equipment and facilities, is necessary for the National security and defense, and I do hereby take over for the United States of America the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto.

Just compensation for the property hereby taken over will be hereafter determined and paid.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this twenty-eighth day of June, one thousand

nine hundred and eighteen, and of the Independence of the United States, one hundred and forty-two.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State.

The second proclamation, awarding compensation, dated December 3, 1918 (40 Stat. 1914), is as follows:

Whereas the Act of Congress making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public—No. 109—65th Congress), contains the following provisions:

"The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminals equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: *Provided,* That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as afore-

said, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States: *Provided further,* That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired";

And whereas, pursuant to the authority vested in the President by said Act of Congress, approved March 28, 1918, the President by a proclamation duly made on the 28th day of June, 1918, determined and declared that the acquisition of title to the foregoing docks, piers, warehouses, wharves, and terminal equipment and facilities was necessary for the national security and defense, and did thereby take over for the United States of America the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto; a more particular description of which said property is set forth in the schedule marked A hereto annexed;

And whereas, pursuant to the authority vested in the President by said Act of Congress, approved March 28, 1918, it was in and by said proclamation of June 28, 1918, expressed and declared that just com-

pensation for the property thereby taken over would be thereafter determined and paid:

Now, therefore, I, Woodrow Wilson, President of the United States of America, pursuant to the authority vested in me by the said Act of Congress, approved March 28, 1918, do hereby determine and declare that the just compensation for the property in and by said proclamation of June 28, 1918, expropriated for the United States of America is the sum of seven million, one hundred and forty-six thousand, five hundred eighty-three dollars ($7,146,583); and I do hereby order and direct that compensation for the same, aggregating said amount of $7,146,583, be made out of the money appropriated by the act approved December 15, 1917, entitled "An Act Making appropriations to supply deficiencies in appropriations for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," continuing and making available until June thirtieth, nineteen hundred and eighteen, the appropriation of $100,000,000 "for the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President," contained in the general deficiency appropriation Act approved April seventeenth, nineteen hundred and seventeen, to the parties and in the amounts set forth in the schedule marked A, hereto annexed; any part of the sum to be paid for

which that appropriation does not suffice to be paid out of the similar appropriation for the fiscal year 1919.

And I do hereby further order, direct, and require under the authority delegated to me by Section 6, subsection c, of the trading with the enemy Act, approved October 6, 1917, that the sum of money specified in said schedule which I determined to be payable to the North German Lloyd, a corporation of the Free and Hanseatic City of Bremen in the German Empire, be paid over to the Alien Property Custodian appointed under the provisions of said trading with the enemy Act, the same to be held by him subject to the provisions of said act.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this third day of December, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States the one hundred and forty-third.

WOODROW WILSON.

By the President,
ROBERT LANSING,
Secretary of State.

The schedule awarding compensation to the North German Lloyd, after describing the property, provides (40 Stat. 1918):

To the North German Lloyd Dock Company, a corporation of the State of New

Jersey, in respect of its reversion, the sum of one dollar ($1.00).

To the North German Lloyd, a corporation of the Free and Hanseatic City of Bremen in the German Empire, $4,831,705 less $47,500, interest paid to the said Prudential Life Insurance Company of America on account of the obligation of said North German Lloyd, namely, four million seven hundred and eighty-four thousand, two hundred five dollars ($4,784,205), to be paid to A. Mitchell Palmer, Alien Property Custodian, appointed under the provisions of the Trading with the Enemy Act, the same to be held by him subject to the provisions of said Act, as directed in the foregoing and annexed proclamation, said sum of $4,784,205 to be chargeable with the payment and satisfaction of all liens, by way of mortgage, judgment or otherwise, existing on, and all taxes and assessments due and exigible on, the foregoing premises or any part thereof, on the 28th day of June, 1918.

QUESTIONS INVOLVED

The first question is whether the taking possession by the United States under the Act of August 29, 1916, chap. 418, 39 Stat. 619, 645, of transportation facilities or systems belonging to enemies gave rise to an implied contract to pay compensation to the enemy.

The second question is whether the award of compensation for the title, authorized by the Act of March 28, 1918, chap. 28, 40 Stat. 459, was

complete and adequate, and if not, whether, under that Act, any officer or tribunal other than the President has power to award additional compensation, and whether, if any claim exists for additional compensation, it has been sequestered under the Trading with the Enemy Act.

ARGUMENT

Summary

I. No implied contract arose to pay compensation for the use prior to the taking of title. The leasehold estate was enemy owned. The possession and control of the docks were taken and held, prior to the taking of title, under authority of the Act of August 29, 1916. There is nothing in that Act from which an intent can be implied to pay compensation for enemy interests.

II. The claim for the value of the use after the taking of title or for interest on the award fails for the following reasons:

(a) The use belonged to the United States after the taking of title, and there is nothing to show that the award by the President did not take into account delay in payment.

(b) The Act of March 28, 1918, designated the President to determine the compensation, and withheld power to award compensation from the Court of Claims.

(c) The enemy-owned claim for the value of the leasehold estate was sequestered by the President under the Trading with the Enemy Act, and the claimant, the former enemy owner, does not own the claim.

I

There was no implied contract to pay for the use of the property for the period prior to taking of title

It will be noted that suit was instituted, not by the Dock Company, a New Jersey corporation,

which was the owner of the fee, but by the North German Lloyd, a German corporation, holder of the leasehold estate and an enemy at the time of the seizure.

The seizure of the possession and use of these properties for the period from April 6, 1917, to the date of taking of the title, June 28, 1918, must have been under authority of the Act of August 29, 1916. No other statute is suggested as authority for the taking of possession of this property.

The Act of August 29, 1916, is a war measure. It relates to transportation systems owned by citizens of the United States as well as those which may be owned by enemies. It makes no provision for compensation. With respect to the seizure under that Act of interests of citizens, protected by the Fifth Amendment, it may be conceded there was an implied intent or contract to pay compensation. A different situation exists with respect to the interests of enemies.

It has been shown in the brief in No. 102, *Rhederei M. Jebsen Company* v. *The United States*, that enemy property found within the country at the outbreak of the war may be confiscated, and that Congress is vested with the power and duty to deal with captures on land and decide whether compensation shall be paid, and if so, to select the tribunal to award it, and that no intent or contract to pay compensation for seized enemy property will be held to exist unless expressed or necessarily implied.

These principles dispose of the first claim for the value of the use of the property prior to the taking of title. There is nothing in the Act of August 29, 1916, expressly authorizing compensation, and there is nothing in the Act from which the implication is necessary that Congress intended in case of seizure of enemy property to waive the belligerent right of confiscation or make any immediate decision as to whether the enemy should be compensated, and there is nothing in the Act to suggest the selection by Congress of any tribunal to award compensation to enemies. If the claimant is to receive compensation for the use of its property for the period from April 6, 1917, to June 28, 1918, it can only be after further action by Congress.

The case of *Brown* v. *United States*, 8 Cranch, 110, cited by the appellant, held that a declaration of war alone was not sufficient authority for confiscation of enemy property, but to authorize confiscation there must be some legislation in addition to the declaration of war. In the present case we do not rely on the declaration of war as the legislative authority for the seizure of possession. The requirement of the *Brown case* was fulfilled here, authority for the seizure being found in the Act of August 29, 1916. It is true that Act said nothing about confiscation, but it did authorize the seizure of possession and control, and as no intent to pay compensation was expressed or necessarily implied its effect was to authorize seizure of pos-

session of enemy property without compensation until further action by Congress. In the *Brown* case there was no statute authorizing the seizure.

II

The claim for the value of the use after the taking of title, or for interest on the award is without basis

The second claim, for value of the use after the date title was taken or for interest on the amount of the award, may be defeated on any one of several grounds. The Act of March 28, 1918, expressly authorizes the purchase or expropriation of the piers, wharves, and terminal properties "now owned by the North German Lloyd Dock Company," a New Jersey corporation, provided that in case of expropriation "the United States shall make just compensation therefor to be determined by the President."

(a) The use belonged to the United States after the taking of title, and there is nothing to show that the award did not take into account delay in payment

The allegation of the petition is that the award did not include any amount for "the use of said premises and property" from June 28, 1918, the date of the expropriation, until December 3, 1918, the date of the award. It would have been error to include any such sum in the award. The title and ownership were taken by the United States June 28th. From that time it had a right to the use of the property belonging to it. Claimant was entitled to just compensation for the value of the property as of June 28th. If there was a delay

in payment of the compensation until December 3rd, it may well be that giving to this statutory provision for "just compensation" the same meaning as is given to the similar phrase in the Fifth Amendment (*Seaboard Air Line case*, 261 U. S. 299), just compensation would include the value as of June 28th plus the value of the *use of the money* until it was paid, but it would be the value of the *use of the money* representing the value of the property on June 28th, and not the value of the use of the property itself, to which the claimant would be entitled. The allegation that no compensation has been paid for the *use of the property* from June 28th to December 3, 1918, is not equivalent to an allegation that the award did not include interest from the date of the expropriation to the date of the award. For all that appears in the proclamation making the award, the President took into consideration the delay in payment in declaring that "just compensation for the property * * * is the sum of seven millions dollars," etc. There is, therefore, no sufficient allegation in the petition to overturn the presumption that the President complied with the terms of the Act of March 28, 1918, and took into consideration every proper element included in just compensation.

(b) The President alone was given power to determine and award compensation

We have here a case where the statute authorizing the seizure of enemy property expressly

provided for compensation and designated the agency to determine and award it. It was optional with the United States whether it would pay compensation to the enemy corporation for its leasehold estate, and it was for Congress to express the national will on this subject and, if it decided to pay compensation, to designate the officer or tribunal to determine and award it, and the award of compensation to the enemy lessee was in the nature of a bounty or gratuity based on a sense of fairness and not on any constitutional obligation. It follows that as Congress in this instance designated the President as the one to determine the compensation, it has definitely and deliberately refrained from giving the Court of Claims any authority or jurisdiction in the premises and has given the President exclusive power to determine and award compensation.

(c) The claim for compensation was sequestered under the Trading with the Enemy Act and does not now belong to the North German Lloyd

The Proclamation making the award contains a provision sequestering under the Trading with the Enemy Act (Act of Oct. 6, 1917, Chap. 106, 40 Stat. 411) the amount awarded to the enemy corporation and providing for the payment of the amount to the Alien Property Custodian.

The Act of March 28, 1918, authorized the acquisition of the docks "owned by the North German Lloyd Dock Company," a New Jersey corporation. It said nothing about the interest

of the German corporation, which was the lessee for 999 years. It is not clear that Congress intended any compensation to be paid to the German lessee. However, the President construed the Act to intend it, but he prevented the amount of the award accruing to the benefit of the enemy lessee by sequestering it.

It was the evident purpose of the President that any amount awarded to the North German Lloyd, the enemy corporation, should be paid to the Alien Property Custodian to be held by him under the terms of the Trading with the Enemy Act, and the statement in the Proclamation on that subject amounted to an order or requirement by the President under that Act, directing the sequestration of any amount to which the enemy corporation became entitled through the seizure of its property; and the claim, having been so sequestered, belongs to the Alien Property Custodian and the former German owner has no right to maintain an action on it.

The principles contended for by the United States in its brief in No. 102, *Rhederei M. Jebsen Company* v. *The United States*, together with the additional considerations set forth above, call for an affirmance of the judgment.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

No. 113. NORTH GERMAN LLOYD, APPELLANT, v. THE UNITED STATES

No. 116. HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG-AMERICAN LINE), APPELLANT, v. THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 113

NORTH GERMAN LLOYD, APPELLANT

v.

THE UNITED STATES

No. 116

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-Gesellschaft (also known as Hamburg-American Line), Appellant

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS IN THE COURT BELOW

The memorandum opinion of the Court of Claims in No. 113 is found at R. 7 and in No. 116 at R. 6. See also 59 Ct. Cls. 974. In both cases the court adopted the opinion in No. 126, *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *The United States.*

GROUNDS OF JURISDICTION

The judgments to be reviewed were entered March 17, 1924. (No. 113, R. 7; No. 116, R. 6.) The Court of Claims sustained demurrers to and dismissed the petitions. Appeals were allowed June 16, 1924 (No. 113, R. 15; No. 116, R. 13), under Sections 242 and 243, Judicial Code.

STATEMENT

These cases are alike in that, in each, recovery is sought for the value of enemy-owned material, supplies, stores, and equipment, and other personal property used in connection with the steamship business and located in and about the docks and piers at Hoboken. It is alleged that the seizures were made under the Act of August 29, 1916, authorizing the President in time of war to take possession of transportation systems, or any part thereof. This Act is quoted at length in the brief in No. 112 (page 66). The question is whether, under the terms of the Act of August 29, 1916, chap. 418, 39 Stat. 619, 645, or the circumstances of the taking, an intent or contract to pay compensation to enemy owners was necessarily implied.

ARGUMENT

Summary

I. The property was enemy owned and the United States had the right to take it without compensation.

II. The power of deciding whether compensation shall be paid for enemy property is in Congress. An intention to pay compensation to enemies should not be found unless expressed or necessarily implied.

III. There is nothing in the Act of August 29, 1916, under which the property was taken, to justify the inference that Congress intended to provide compensation for enemy interests.

IV. The circumstances attending the taking do not form a basis for implying an intent to pay compensation.

The property taken was enemy owned. The propositions contended for in the Government's briefs in No. 102, *Rhederei M. Jebsen* v. *The United States*, and No. 112, *North German Lloyd case*, dispose of this case. The United States had the right to take the property without compensation. It was and is for Congress to determine whether compensation should be paid for enemy interests; and if so, what officer or tribunal should award it. An intent to pay compensation in such a case should not be held to exist unless by express provision or necessary implication the intent of Congress is made clear. The Act of August 29, 1916, makes no express provision for compensation, and there is nothing in it to justify the inference that Congress intended to waive its right to seize without compensation enemy interests, and in this respect there is even less reason for implying an intent or contract to pay compensation to enemies than in the case of the Joint Resolution of May 12, 1917. An implied contract to pay compensation for citizens' interests no doubt arose because the Fifth Amendment entitled them to compensation, but this is no basis for an implication of intent or contract to pay compensation

to enemies. In so far as the seizure of enemy interests was involved, the Act of August 29, 1916, left open for further consideration by Congress the question whether compensation should be paid; and if so, the selection of the tribunal or officer to award it.

The contention that the receipts and memoranda signed by officers of the United States at the time the property was taken amounted to a contract to pay is without substance. (No. 113, R. 4–5; No. 116, R. 3–4.) Their purpose was to preserve a record of what property was turned over to the officers of the United States.

The judgments in these cases should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 114

NORTH GERMAN LLOYD, APPELLANT

v.

THE UNITED STATES

No. 117

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (also known as Hamburg-American Line), Appellant

v.

THE UNITED STATES

No. 126

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, Appellant

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

These cases differ in no substantial respect from No. 102, *Rhederei M. Jebsen Company* v. *The*

United States. Recovery is sought for the value of enemy-owned vessels, titles to which were taken by the United States subsequent to May 12, 1917, by Executive Order, pursuant to the Joint Resolution of May 12, 1917.

ARGUMENT

The brief for the Government in No. 102, *Rhederei M. Jebsen Company* v. *The United States,* covers every question in these cases. The judgments should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

APPENDIX

LEGISLATIVE HISTORY OF JOINT RESOLUTION OF CONGRESS OF MAY 12, 1917 (S. J. Res. 42), CHAP. 13, 40 STAT. 75

PROCEEDINGS IN THE SENATE

When the resolution was first introduced in the Senate on April 23, 1917, it read:

> *Resolved, etc.*, That the President be, and is hereby, authorized to take over for the United States the possession and title of any vessel, within the jurisdiction of the United States, of any subject or citizen of any nation with which the United States may be at war, and, through the United States Shipping Board or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise, as he may see fit.
>
> The property rights and claims to compensation, if any, of such subject or citizen shall be determined at the end of the war. [Cong. Rec. 65th Cong., 1st Sess., vol. 55, pt. 1, p. 930.]

It was thereupon referred to the Committee on the Judiciary.

When reported to the Senate by Mr. Culberson, Chairman of the Judiciary Committee, on April 30, 1917, it read:

> That the President be, and he is hereby, authorized to take over to the United States

the possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States, except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings hereinafter authorized on any claim for compensation.

Sec. 3. That any person or corporation may institute a suit against the United

States of America in the Court of Claims thereof for the recovery of the damages which he may sustain through the exercise of the power herein conferred upon the President. Such damages shall be limited to just compensation for the interest or right of which claimant is deprived by reason of such taking. In ascertaining such compensation there shall be excluded any value added to the vessel by reason of work done or improvements placed thereon by the United States. In order to recover a judgment the claimant must prove that he was the owner at the time of taking of the interest or right for whose taking he seeks compensation; and that no nation with which the United States may be at war at the time of such taking, or at the time of rendition of judgment, nor any corporation, subject, or citizen of such nation, has any interest, direct or indirect, in such claim, or in the judgment which may be rendered thereon; and that claimant acquired in good faith and for substantial consideration the right or interest, for whose taking he seeks compensation, prior to the commencement of war with the nation whose citizen or subject owned, in whole or in part, the vessel taken, or under the register or flag of which such vessel was at the time of entry into the jurisdiction of the United States; if claimant be a corporation it must also prove that the majority of its stock is not owned by subjects or citizens of a nation with which the United States may be at war and

was not so owned at the beginning of such war. If the required facts be established the court shall have power to render judgment for the amount due claimant subject to the right of appeal to the Supreme Court of the United States; but if such facts be not established the court shall render no judgment and shall make a report to Congress stating its findings of fact.

SEC. 4. The Court of Claims is hereby authorized to make all needful rules and regulations not contravening the laws of the land or terms of this act for executing the provisions hereof.

SEC. 5. All claims upon which suit may not be instituted prior to the expiration of one year from the date of exchange of ratifications of a treaty of peace with the Imperial German Government shall be forever barred. [Cong. Rec., 65th Cong., 1st Sess., vol. 55, pt. 2, p. 1572.]

Mr. Underwood asked the question as to whether the purpose of the Joint Resolution was to fix at that time the status or the right of persons claiming ownership in the foreign vessels to go into our courts at a future time and sue the United States.

Mr. Fletcher, a member of the Judiciary Committee, answered:

> It provides that where there is any interest or any lien or any claim against any of these vessels by an American citizen, for instance, it may be hereafter adjusted in the Court of Claims.

Mr. UNDERWOOD. Well, does it not go further than American citizens?

Mr. FLETCHER. It includes neutrals also; but as to those citizens or subjects or corporations of countries with which the United States is at war at the time of the seizure or at the time of the adjudication, it provides that those cases may be determined in the Court of Claims simply as to the facts, and the Court of Claims is to report those facts back to Congress. The Joint Resolution provides that no judgment shall be entered in those cases by the Court of Claims. [P. 1572.]

Mr. UNDERWOOD. * * * On the question as to whether the owners of these vessels should be paid the value of the vessels, I think it is a question that ought to be determined in the future. The German Government sank our ships on the high seas when we were a neutral power, and I have heard nothing to indicate that they are prepared to pay American citizens for the sinking of those ships the value of those ships; and when we have German vessels in our hands, as far as I am concerned, I am not disposed to pay the citizens of Germany the value of that property until they are prepared to pay our citizens the value of the property they have destroyed. [Pp. 1572, 1573.]

Continuing, Mr. Underwood said (p. 1573):

When you pay a lien of an American citizen on a German ship you may release

a German citizen from his obligation under the lien. I fear you are clearing the way for our enemies hereafter to establish a precedent for the payment for their property.

* * * * *

Of course, I feel that it is of the utmost importance that these ships should go to sea, but I must say, as far as I am concerned, I think all the action that is needed to-day, if any action is needed at all, for the Congress of the United States is to pass a bill directing and authorizing the President of the United States to take over these ships, put them in commission and use them, and then leave the question as to whether we should pay for them or pay for the use of the ships to be determined when the war is over and the status of American citizens and the status of German citizens is fixed by a treaty of peace.

* * * * *

At page 1575:

Mr. SMITH of Georgia. I desire to amend the joint resolution by striking out, on page 3, at the beginning of line 3, the words "hereinafter authorized," and to strike out all of section 3, all of section 4, and all of section 5 of the joint resolution as reported from the committee.

Mr. STONE. I ask for a division on the question.

The PRESIDING OFFICER. The question is on agreeing to the first amendment suggested by the Senator from Georgia, namely, to

strike out the words "hereinafter authorized" at the beginning of line 3, on page 3.

The amendment was agreed to.

The PRESIDING OFFICER. The question now is on the second amendment suggested by the Senator from Georgia, to strike out all of section 3, which will be stated by the Secretary.

The SECRETARY. It is proposed to strike out section 3, in the following words:

"SEC. 3. That any person or corporation may institute a suit against the United States of America in the Court of Claims thereof for the recovery of the damages which he may sustain through the exercise of the power herein conferred upon the President. Such damages shall be limited to just compensation for the interest or right of which claimant is deprived by reason of such taking. In ascertaining such compensation there shall be excluded any value added to the vessel by reason of work done or improvements placed thereon by the United States. In order to recover a judgment the claimant must prove that he was the owner at the time of taking of the interest or right for whose taking he seeks compensation; and that no nation with which the United States may be at war at the time of such taking, or at the time of rendition of judgment, nor any corporation, subject, or citizen of such nation, has any interest, direct or indirect, in such claim, or in the judgment which may be rendered

thereon; and that claimant acquired in good faith and for substantial consideration the right or interest, for whose taking he seeks compensation, prior to the commencement of war with the nation whose citizen or subject owned, in whole or in part, the vessel taken, or under the register or flag of which such vessel was at the time of entry into the jurisdiction of the United States; if claimant be a corporation it must also prove that the majority of its stock is not owned by subjects or citizens of a nation with which the United States may be at war, and was not so owned at the beginning of such war. If the required facts be established, the court shall have power to render judgment for the amount due claimant subject to the right of appeal to the Supreme Court of the United States; but if such facts be not established the court shall render no judgment and shall make a report to Congress stating its findings of fact."

Mr. CULBERSON. On that I ask for the yeas and nays.

The yeas and nays were ordered; and having been taken, the result was announced—yeas 64, nays 10, as follows:

* * * * *

So the amendment was agreed to.

The PRESIDING OFFICER. The question now is on the next amendment, suggested by the Senator from Georgia, to strike out all of sections 4 and 5, which will be stated by the Secretary.

The SECRETARY. It is proposed to strike out section 4 and section 5, in the following words:

"SEC. 4. The Court of Claims is hereby authorized to make all needful rules and regulations, not contravening the laws of the land or terms of this act, for executing the provisions hereof.

"SEC. 5. All claims upon which suit may not be instituted prior to the expiration of one year from the date of exchange of ratifications of a treaty of peace with the Imperial German Government shall be forever barred."

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. WALSH. I offer the following amendment to come in as a new section to be known as section 3.

The PRESIDING OFFICER. The amendment will be stated.

The SECRETARY. Add as a new section the following:

"SEC. 3. That any vessel so seized shall be condemned in any district court of the United States for the district in which the same may be or in any court created by or under the authority of the United States having admiralty jurisdiction over the place at which such vessel may be seized, or into which it may be taken, pending which proceedings for condemnation it may be requisitioned by the United States under order of the court for such use or disposi-

tion as is provided for in section 1 of this act.

"No bounty, prize money, bonus, or other gratuity or reward shall be due or be paid to any person on account of the taking or seizure of any of the ships mentioned in section 1 of this act."

Mr. CULBERSON. On that I ask for the yeas and nays.

The yeas and nays were ordered; and having been taken, the result was announced—yeas 3, nays 66, as follows:

* * * * * *

So Mr. Walsh's amendment was rejected.

Mr. KNOX. I move as a substitute to insert the following:

The Secretary read as follows (p. 1576):

"Whereas the activities of the Imperial German Government in its efforts to destroy the commercial vessels of the United States, its allies, and the vessels of neutral powers creates an immediate emergency and an extreme necessity to at once replenish in a practical way the loss of ships thus sustained: Therefore be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be, and he is hereby, requested to at once requisition all vessels of alien enemies of the United States in the ports and waters of the United States, or elsewhere found, and to use the

same in the prosecution of the war against the Imperial German Government in such trade or manner as will, in his judgment, best subserve the interests of the United States and its allies."

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Pennsylvania.

Mr. KNOX. On that I demand the yeas and nays.

The yeas and nays were ordered; and having been taken, resulted—yeas 28, nays 43, as follows:

* * * * *

So Mr. Knox's amendment was rejected.

The joint resolution was reported to the Senate as amended and the amendments were concurred in.

The joint resolution was ordered to be engrossed for a third reading, read the third time, and passed.

The title was amended so as to read: "A joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes."

After five hours spent in legislative business and executive session the doors were reopened.

So the resolution as passed by the Senate read (p. 1572 et seq.):

That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These

findings shall be considered as competent evidence in all proceedings on any claim for compensation.

PROCEEDINGS IN THE HOUSE

(Excerpts from the Congressional Record, vol. 55, part 2, 65th Congress, 1st session)

At pages 1900 and 1901:

Mr. ALEXANDER. Mr. Speaker, I call up for consideration Senate joint resolution 42, authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

Mr. MANN. Mr. Speaker, I suggest that the gentleman has to move to go into Committee of the Whole House on the state of the Union.

Mr. ALEXANDER. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of Senate joint resolution 42, and pending that motion I would like to have some agreement about the time of general debate. I ask unanimous consent that general debate be limited to an hour, to be confined to the subject matter of the resolution.

* * * * *

Mr. ALEXANDER. Mr. Chairman, I ask unanimous consent that the first reading of the resolution be dispensed with.

Mr. MANN. Mr. Chairman, I shall have to object to that. We do not know yet what the Senate resolution is.

The CHAIRMAN. The Clerk will report the resolution.

The Clerk read as follows:

"*Resolved, etc.,* That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his depart-

ment. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

Mr. ALEXANDER. Mr. Chairman, the gentleman from North Carolina [Mr. Webb] introduced House joint resolution 62, which was referred to the Committee on the Merchant Marine and Fisheries and was reported back to the House on the 1st day of May. As reported to the House, the text of House joint resolution 62 is the same as the text of Senate joint resolution 42 as it passed the Senate. Mr. Polk, at the first hearing before the House committee, was present and made a statement, and Mr. Woolsey, representing the Department of State, and Attorney General Gregory were before the House Committee on the Merchant Marine and Fisheries at the second hearing. After hearing the statements made by these gentlemen, the committee agreed to strike out all of the subject matter of House joint resolution 62 and substitute, by way of amendment, the provisions in Senate joint resolution 42 as it passed the Senate. House joint resolution 62 as amended comes to the House with the unanimous approval of the committee, There are two propositions contained in the resolution.

First—

That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all Territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction

was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

The second proposition is this:

That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

This resolution is intended to give the President authority to take over the immediate possession and title of the German refugee ships. These ships sought refuge in the harbors of the United States and of our insular possessions following the outbreak of the war in Europe, and are now within the jurisdiction of the United States.

* * * * *

At page 1901:

Mr. ALEXANDER. Between 600,000 and 700,000 tons of these ships, many of them very fine pas-

senger ships and others freight ships, are in our harbors. They sought refuge in our harbors at the beginning of the war in Europe, and they were still in our harbors at the time we became parties to the war against Germany. They did not dare leave our ports for fear of capture by British and French cruisers hovering along our coasts. Many ships were more or less damaged by their officers and crews following our declaration of armed neutrality, presumably by order of the Imperial German Government. A survey of the vessels has been made, and repairs are proceeding with a view to their use in service of the United States at the earliest practical moment. They are now in the possession of the collectors of the ports in the several ports where they are now docked under orders issued by the Secretary of the Treasury.

It has been said that the President might have taken over possession of these vessels, seized them, confiscated them on behalf of the United States without action by Congress. I question whether it would have been proper for him to do so. I think the decisions of the Supreme Court of the United States sustain the contrary view and that Congress should authorize that to be done.

That we have the right to take over the title to these vessels, to seize them, to confiscate them, I think is beyond question. It is not my purpose to discuss this matter at length, but I will call attention to the case of Brown against United States, Eighth Cranch, page 121, and particularly to the statement by Chief Justice Marshall as regards the right of the Government to seize or confiscate enemy ships * * *.

* * * * *

Continuing at page 1903:

* * * * *

Mr. MANN. No; but it takes the ships and title without compensation.

Mr. ALEXANDER. Yes; and we have the right to take the ships and title without compensation, too.

Mr. MANN. Well, that is a constitutional question. I do not agree with the gentleman on that.

Mr. ALEXANDER. If they have any equities, they must be adjusted hereafter, just like the equities of the German owners, if we pursue the time-honored policy of our Government on the conclusion of the war, or later.

Mr. MANN. Yes; "later" is well said.

Mr. ALEXANDER. We could compensate the Hamburg-American and the North German Lloyd Steamship Companies for these ships; if we pursue our policy in the future as in the past we will compensate these owners for these vessels, but at this time, early in the war, and with conditions changing from day to day, the equities shifting, it will be time enough, in the view of the Senate and in the view of the administration and in the view of the Committee on the Merchant Marine and Fisheries, to adjust these equities after peace has been declared, because in the meantime we will no doubt have property destroyed; we will have counterclaims against Germany; and it will be time enough to do so then.

* * * * *

Continuing at page 1904:

Mr. ALEXANDER. All that is quite apart from the issue here. We are at war with Germany and these are German ships in American ports. We have a right to seize them and confiscate them if

we wish to do so. The equities as between us and private owners can be left to be adjusted hereafter.

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Mr. ROBBINS. Will the gentleman answer a question?

Mr. ALEXANDER. Yes.

Mr. ROBBINS. What is the probable liability of the United States for these ships so seized?

Mr. ALEXANDER. None at all.

Mr. ROBBINS. If we answer later in damages, what is the liability?

Mr. ALEXANDER. None at all.

Mr. ROBBINS. Then the gentleman thinks we never will be called upon to pay for these ships?

Mr. ALEXANDER. If we do it will not be a legal liability, but on account of the policy of the Government in the past to recognize claims of private parties.

Mr. ROBBINS. The gentleman stated that a part of these ships were owned by corporations organized by Germans in the United States.

Mr. ALEXANDER. No; I stated just the contrary; they are owned by German corporations incorporated in Germany.

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At page 1921:

Mr. STAFFORD. I wish to call the attention of the gentleman to the fact that by the action of the committee that section was eliminated.

Mr. HARDY. The gentleman is correct. That was the form in which the House bill stood, and is perhaps what will be embodied in future legislation.

But in order to expedite this legislation we have eliminated all except the first and second sections. As the bill now stands we have only section 1 and section 2, which is the form in which the resolution was passed by the Senate. Section 2 provides for a survey and estimate of the value of the ships taken over. It does it in order that that survey might be held as prima facie evidence of the facts; that is, of the value of the ships when taken over. It does not undertake to decide the matter or manner of compensation now. We leave the final settlement of the claims of American citizens and of all others to be ascertained and determined by proceedings that may be instituted under the laws that will be passed when Congress has ample time to pass those laws.

I take it that the rights of German citizens as against the American Government for property of theirs that is taken under this law will in its ultimate conclusion depend largely upon the action of the German Government with reference to the property of our citizens which may be taken over by that Government, and that that will be settled in the final terms of peace under the treaties which may be negotiated between this Government and the German Government; and if we, in accordance with the ideas of the gentleman from Wisconsin [Mr. Stafford], were to give the right now to a German citizen to go into our court and establish his claim and obtain judgment against the Government of the United States for damages, we would then leave our citizens hopeless for any recovery in Germany after the war was ended, and I think we would do something that no nation ever has

done, or ever will do, if, pending the war and while the war is going on, we authorize German citizens to institute a suit against our Government for property taken belonging to them and recover judgment and obtain compensation before that war is ended. That is what the gentleman from Wisconsin wants us to do.

I want to say that, so far as our policy as a nation is concerned, from its foundation it has never been a policy of ruthless power. We have never intended, never desired, and never will desire to wrongfully take the property of citizens of any nation, even though we are at war with that nation. It has been our policy that any property which comes rightfully within our jurisdiction will have all of the rights of its owner preserved, and when this war is ended there will not be a German right which will be violated by the American people, and I believe I know this Congress well enough to know that it will never use its power to take from any man, German, Austrian, Englishman, Frenchman, or American, any right that justly belongs to him, but we do not propose to settle up the claims that should be settled by the German Government for and with its citizens before we know what Germany will do with American rights. [Applause.]

Mr. Chairman, this is a very simple proposition. There are over 600,000 tons of German shipping in our ports, which we urgently need now in war times. This bill should be passed in 20 minutes. We take those vessels, and under section 2 we arrive at their value as best we can, and wait until the war is ended to determine what remedies,

rights, and recompenses we shall grant to those damaged.

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At page 1922:

Mr. HARDY. Will the gentleman yield for a question?

Mr. SMALL. Certainly.

Mr. HARDY. Does not the gentleman recognize the fact that by only incorporating sections 1 and 2 in this bill, finding the value and leaving it there as the permanent finding, that we put ourselves in the attitude by future legislation to do whatever Congress in deliberate purpose may find to be just?

Mr. SMALL. The gentleman is entirely right, and I have no disposition to criticize the committee in not providing in this bill any specific declaration upon compensation; but as a Member of this House, believing that we are big enough and rich enough to do exact and even justice, without regard to what is done by any other country, I wish to make, even from an humble source, an expression of what I believe ought to be the attitude of the United States upon this question, and whenever the time shall come, and I am not in favor of postponing that time until we can weigh up in the scales the acts of Germany so as to determine whether by reason of these acts we should do an act of justice or not, that I am in favor of this great country doing justice, regardless of the attitudes or acts of any other country.

Mr. TOWNER. Will the gentleman yield?

Mr. SMALL. Certainly.

Mr. TOWNER. Is not there great force in the suggestion made by the gentleman from Texas

[Mr. Hardy] when he says that it would be very unwise for us at this time to make any declaration regarding that matter, for the reason that necessarily there will be a treaty at the close of this war between Germany and the United States, and in such treaties all these matters are the matters that are determined by treaties as to the rights of individuals respectively against the other countries for damages for the destruction of their property? That is always included in such treaties. and is it not wise for us now not to put any provision in this bill, because that will be attended to when the treaty relations between the Governments are closed at the end of the war?

Mr. SMALL. I admit, Mr. Chairman, there seem to be strong reasons for that, and I so endeavored to express myself a moment ago.

The CHAIRMAN. The time of the gentleman from North Carolina has expired.

Mr. HARDY. Will the gentleman yield for just another question?

The CHAIRMAN. The time of the gentleman from North Carolina has expired.

Mr. HARDY. Mr. Chairman, I ask that he may have five minutes more.

Mr. ALEXANDER. Mr. Chairman, I yield five minutes more to the gentleman.

Mr. HARDY. I would just like to call the gentleman's attention to another thing along that line. The rights of our citizens against foreign governments is never presented through a suit against those governments, but through diplomatic representation of our diplomatic agents. The rights of German citizens will be ascertained after this war

is over through diplomatic channels, by diplomatic methods, by the German Government, and our citizens will have their rights established in the same manner. So that a claim for damages now would be extremely contrary to international custom, it seems to me.

Mr. SMALL. I am not prepared to make the contention that our relationship toward this question in making compensation should be set forth in this bill, nor am I particular as to when it is done, although I do not think there should be any undue delay. The only point I make is that we should do that which is right and just with relation to our appropriation of these ships.

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At page 1923:

Mr. EDMONDS. * * *.

I am sure there was no intention to confiscate this property. It was simply left open for adjudication at an early date.

We need the ships. There is no question about that. We have got to have them. They are lying useless in the harbors, and the attorneys of the Hamburg-American Line do not make any question as to our power to take them. They simply state that in so far as the resolution empowers the President to take over the ships of the Hamburg-American Line they do not raise any question.

We take the ships. We have arranged to leave the question of compensation open. The treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in

the Court of Claims, where they have a right to take it.

In the case of Wagner against The *Juniata*, Twenty-eighth Federal Cases, page 3821, the court, reaffirming the principle stated by Chief Justice Marshall, said:

> In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the court equally strong against the claim of the libellant; she is to all intents and purposes property as much infra-territorial, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States than the river upon whose waters she is now floating.

Now, gentlemen, undoubtedly the committee, realizing that the Government needed these ships, has taken the best course that it is possible to devise to take possession of them at this time, and has left the question entirely as to how they were to be settled open for the future.

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Commencing at page 1924, Mr. Hadley said:

There is one point to which I wish to address myself very briefly, which was being touched upon by the gentleman from Texas [Mr. Slayden] when I was called out. Not having heard his remarks, I wish to allude to that phase of the resolution, though it may be somewhat of a repetition. I do not know about that. I refer to the second section of the resolution.

There seems to be quite a difference of view as to what we ought to do with regard to the question of compensation. I take it, when this discussion has been analyzed, there is really no serious controversy over any other question, if indeed there is a controversy there. There should be none upon that point. I desire to draw the attention of the committee directly to what the resolution provides in terms. It provides that the Secretary of the Navy shall appoint a board, with the approval of the President, to make a survey of the vessels which it is proposed to take over, with a view to determining their actual value at the time they are taken; and not only the vessels but the equipment and appurtenances and all property contained therein at the time of the taking. And what is the purpose of that survey? It is in order that it be preserved as a permanent record for future use in the event it should become necessary to consider the question of compensation. It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution.

It is true that the resolution does not in terms declare that compensation shall be paid. It is equally true that it does not either declare or intimate that compensation shall not be paid. It simply provides the present machinery whereby the evidence of value shall not only be ascertained but that it shall be preserved; and having been ascertained and preserved, it makes it mandatory, in the terms of the resolution, that such evidence shall be recognized as competent proof in any

court having jurisdiction. At all events that is the effect of this language:

> These findings—
>
> Meaning the findings of the board of survey—
>
> shall be considered as competent evidence in all proceedings on any claim for compensation.

How much further can Congress go at this time? How much further should it go than to preserve for the benefit of all persons who may be interested in the subject matter the evidence to which the owner may appeal in the future to show his damage? We ought not now to attempt to define the measure of damage, or to define the principle upon which compensation shall be paid; but we ought to preserve the means of determining the elements of value which go to the determination of the question of compensation and the measure of damage, in any court in which the question may subsequently arise. In my judgment that is as far as we ought to go at this time. We recognize that compensation may be due or may not be due. We recognize that under the circumstances of the case that question may arise, and it is proposed in the resolution to take the only sensible, reasonable, and practical means, as I look at it, of preserving the record for the benefit of whoever may be interested, whether he be alien or citizen. Then whatever court may hereafter be applied to, whether it be a prize court, court of claims, or any other court of competent jurisdiction, it will be a matter for that court to determine whether the compensation will be paid and not a question for us now to determine. It is not feasible and not

practicable that we should attempt to determine that matter or to preserve any other right except to preserve all the means by which the real parties in interest may be protected if they ought to be protected. That is as far, I think, as we ought to go.

Mr. SLAYDEN. Will the gentleman yield?

Mr. HADLEY. I will.

Mr. SLAYDEN. Does not the gentleman think that after the war in an adjustment made by special commissions or diplomatic agents these records would be useful, and the fact that Congress did take such pains to prepare for the making and preservation of the records would indicate a disposition on the part of the Representatives of the people in this country that that should be the policy of the Government.

* * * * *

Mr. HADLEY. That is correct and represents my view. I thank the gentleman for eliciting it. In addition to the preservation of the record for court procedure, it will be useful in the determination of questions arising on the treaty of peace that may be entered into at the conclusion of the war, and, as suggested by the gentleman from Texas, will show the resolution and purpose on the part of the Government to recognize the claim for damages in case the party has a right to it.

It has been stated that we have 600,000 gross tons, approximately, of German tonnage to be affected, exclusive of that of other countries, or about 350,000 net tons. Everyone concedes and recognizes the immediate, urgent, and pressing necessity [p. 1925] on the part of this Government for additional tonnage. I regard it as not only

our right under the authorities which have been cited and under the statements made by the distinguished chairman of the committee to take this tonnage over, but under the circumstances—the war in which we are engaged and the circumstances which led up to it—it is our duty to do so and our duty to impress it into the service of the country for the prosecution of our commercial business and for the purpose of contributing to the support of the armies of the Allies as well as our own.

I do not desire to repeat the arguments and go over the discussion of international treaties, because they have been very fully presented. I wished primarily to speak on the question of the construction of the second section of the resolution. I hope gentlemen considering the resolution will not lose sight of the fact that, while the committee did not attempt to provide the machinery for the final solution and determination of the matter, it did not ignore the fact that compensation might be had. I think the committee has done the proper thing in providing the means of ascertaining the value, so that the determination of the question of compensation in the future may be had if, indeed, it should arise. I yield back the balance of my time.

Mr. ALEXANDER. Mr. Chairman, I yield five minutes to the gentleman from Virginia [Mr. Montague].

Mr. MONTAGUE. Mr. Chairman, the remarks that I desired to make have been anticipated by the lucid statement of the gentleman from Washington, who has just taken his seat.

It appears to me the resolution has gone as far as it is practicable to go, as far as sound expedi-

ency and wisdom will justify. We can not go further, because we have no information to enable us to go further. There may be in the progress of this war developments that will enter into this question, and that different application of the principles will be then considered from what would now be considered if action had finally to be taken at this time.

That is to say, Mr. Chairman, that we can not do exact justice until we have all the facts in hand and the final accounting is taken. I do not take the view of the gentleman from North Carolina [Mr. Small] that we should now utter or proclaim an abstract rule of justice respecting our contemplated conduct. I view this matter largely as one of offset and of accounting. If we have claims against Germany and Germany has claims against us, they can only be determined in or at the final accounting.

Mr. HARDY. Will the gentleman yield?

Mr. MONTAGUE. For a question.

Mr. HARDY. And that will be through a representation of the diplomatic agents of the several Governments representing its citizens?

Mr. MONTAGUE. I imagine that would be the agency or instrumentality to ascertain these facts and to perform such accounting and settlement.

Mr. TOWNER. Will the gentleman yield?

Mr. MONTAGUE. I will.

Mr. TOWNER. Is it not the modern approved practice in the settlement of claims of this character that there shall be appointed by the final treaty a commission to determine the respective claims of individuals arising out of the war?

Mr. MONTAGUE. I think that has been the practice, but I do not desire to discuss the practice; I only wish to impress the fact that the claims of the United States and the claims of Germany are not separable. They are related and inseparable in the final accounting, and to do justice we must have them both at hand and give them both consideration and a fair apportionment.

* * * * *

Mr. MONTAGUE. * * * May I be permitted one other remark in relation to the suggestion of my friend from Texas [Mr. Slayden]? I expect to see the United States practice the most rigid lines of justice and adherence to her treaties; but what circumstances may hereafter occur to disrupt, neutralize, or modify our treaty rights we do not now know, we can not now foresee. To say now that we can lay down a hard and fast line as to exactly what we will do without knowing what Germany will do or has done is to jump into the dark. All we can do is to do what we have done, to take the appraisement or survey of these vessels as they now stand, fresh in our minds as the incident occurs, and hold it hereafter as evidence to be submitted to the appropriate tribunal that will finally determine the mutual offsets, which offsets may not all now be in existence but may hereafter arise from time to time until the conflict is ended.

Mr. GREENE of Massachusetts. Mr. Chairman, I yield 10 minutes to the gentleman from Kansas [Mr. Campbell].

Mr. CAMPBELL of Kansas. Mr. Chairman, I shall not use the 10 minutes for the very good reason that what I had in mind to say has been better said than I could have said it. There is

no question about not only the right but the duty of the United States at this time to take over these ships. What has been done and what shall be done with respect to the taking of the ships is a matter that appeals to everyone, layman as well as legislator, and those who have given no attention whatever to the study of international law as well as to those who have given it a most thorough study.

I have been impressed, the more I have thought about it, with the fears of those who have raised the question as to whether or not justice would be done to the owners of these ships at the close of the war. I do not agree that any settlement should be made at this time with the owners of these ships; but the owners of these ships need have no fear; they need not look forward to a time when the war shall have been ended to any difficulty they will have in getting justice from the United States. As to whether or not these ships shall become the victims of submarines at the hands of the German Government raises a question that will no doubt enter into the settlement of the matter of the payment for these ships; but the Government of the United States has always maintained its position of adhering with the strictest account to every treaty that it has entered into and to every obligation that it has assumed or that is thrust upon it, and that will be true with respect to these ships and to every incident growing out of this war as it has with respect to every other. The owners of the ships and the German Government may well look back to the action of the United States at the termination of the Spanish-

American War, when this Government did more than was really expected of it by the vanquished. We did more for Spain than Spain had a right to expect. We did more for Spain than many of the people of the United States believed we ought to do; but it was the policy of the Government to do just what was done. That is the American feeling, and has been. That is the spirit of the American soldier at the termination of a war in which he has been a conqueror. Gen. Grant said to Gen. Lee and his men, "Keep your side arms and take your horses; you will need them for the spring plowing." That is the American spirit. So, I say, there need be no apprehension upon the part of the rightful owners of these ships with respect to the manner in which they shall be treated at the termination of the war. But we can not say now—we can not say here—what the conditions will be between now and the end of the war. We can not say what the treaty of peace or what range of subjects the treaty of peace will cover; but that treaty will make provision for such commissions as are necessary to adjust the matters growing out of the war with respect to the claims of citizens of foreign countries residing here, whether belligerents or otherwise, whose property has been affected during the war.

That is all I had in mind to say, and I would not have stated it if it had not been that it has seemed to me there has been some anxiety here for fear that the Government of the United States would take advantage of its power in the premises and in the final conclusion not do justice by the

owners of any property it may seize for war purposes. [Applause.]

I yield back the remainder of my time.

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At page 1929:

Mr. LENROOT. I was coming to a discussion of that proposition if the gentleman had not asked me that question. I was stating, first, what international law was upon the subject. I stated what the policy of the United States had been, and I am frank to say I believe that should continue to be the policy of the United States. But every situation must depend upon the particular facts in that situation. Now, what is the situation that we have before us at the present time with reference to the taking over of these ships? I do not say for a moment that we ought not to compensate the owners of these ships. I do say the committee is right in not undertaking to provide for their compensation now. And let me give the reason why I think it should not be done. In the first place, it is a matter of grace with any nation, and not of international law, as to whether they will compensate or not. If they do compensate, there is an obligation of equitable fair dealing upon the part of the owners of the ships as well as upon the part of the United States Government. Now, we are informed with reference to many of these ships that they were damaged and disabled by their owners, many of them, for the very purpose of depriving the United States of the power of making use of them. Now, shall it be said, as a matter of justice and equity, that an enemy subject who is

the owner of a ship, and who voluntarily disables the ship for the purpose of injuring the United States, shall have the same rules of equity applied to him as to compensation as one who, finding his ship in the harbor and unable to depart, leaves that ship to be taken over and paid for by the Government? I think not.

Mr. SISSON. Then in addition to the statement made by the gentleman at this time we ought not to go into the question of payment, because in the settlement of the international differences and damages that may have been done to American citizens by the German Government those things would have to be considered at the same time.

Mr. LENROOT. That is true. Then there is another consideration. When these ships are taken over they will be engaged in merchant transportation. They will be in every sense of the word, so far as what they do is concerned, merchant vessels. Now, Germany, under international law, if she would observe it, has certain obligations with reference to the capture or destruction of merchant vessels. Now, when we take these vessels over, if Germany sees fit, in violation of international law, to destroy one of these German vessels that we have taken over, is it not a question for serious consideration at least, when this war is over, whether we should compensate a German subject for a vessel that has been unlawfully destroyed by his own Government? [Applause.]

Secondly, supposing one of these vessels is captured on the high seas by the German Government, as she has a right to [p. 1930] capture them,

and supposing when Germany captures them she turns the vessel over to its owners, shall the owners get the vessel and also get from the United States Government the value of the vessel? Perhaps so. I am not expressing any opinion about it. But certainly we ought not at this time to make any such provision as that.

Something has been said about the treaty existing between this Government and Germany. I do not know whether that section has ever been read into the Record, but I think it should be, with reference to the obligations contained in the treaty of 1799 between this country and Germany. I want to read article 12 of that treaty.

> Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contractng parties propose after the return of a general peace to agree, either separately between themselves or jointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars.

Now, mark this:

> And if in the interval either of the contracting parties—

And that interval has existed now for the past three years—

> And if in the interval either of the contracting parties should be engaged in a war

to which the other should remain neutral, the ships of war and privateers of the belligerent power—

In this case Germany—

shall conduct themselves toward ports the merchant vessels of the neutral power—

In this case the United States up to the declaration of war—

as favorably as the course of the war then existing may permit, observing the principles and rules of the law of nations generally acknowledged.

That was the treaty between this country and Germany. Is there anyone who will say that that treaty has not been most openly, flagrantly, and deliberately violated by Germany? [Applause.] And then will anyone say that because there was also in another article of that treaty a provision that enemy subjects whose property is taken should be compensated, we shall be bound, but Germany shall not? Those are questions that ought not to be settled now in this bill. Those are questions that ought to come up and be settled when this war is over. [Applause.]

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Mr. FESS. Mr. Chairman, I think the gentleman from Wisconsin [Mr. LENROOT] made two very important observations on two technical questions that grow out of this proposed resolution, both of which should be kept in mind when the matter of future adjustment is considered. I think these ought to be emphasized because they are largely the crux of the entire dispute over the question of confiscation, if here is such a dispute. I do not believe that there is anyone in the Congress who

seriously questions the right under international law of the United States to take over these vessels. They are property of citizens of a foreign country which is at war with us. I can not understand upon what angle any discussion would be carried on that the United States, which is now a belligerent country, could not take over the vessels in the ports that belong to its enemy. Such right is certainly clear under international practices. The first section of the bill authorizes the President to do that thing, and if the bill would stop with that there might be some question of the wisdom of the policy, but certainly none on the authority, for that first section suggests that the United States can take over title and possession and operate or lease or charter and equip these vessels. That indicates a right in a belligerent nation, and that right is certainly well defined in international law; but the second section suggests whether this is to be confiscation or requisition. If the second section were not in the bill, we would jump to the conclusion that it probably meant confiscation. The first section takes over both possession and title and makes no suggestion of future adjustment. But the second section suggests that it is to be requisition, or at least it lays the grounds for it, since it there provides for a board of survey to ascertain the values of these vessels. It does not specify just why that is done, but all of us understand that in case it is to be adjudicated on the question of value, this Government by this provision shows clearly its intention not to take any advantage of the owners of these vessels. We here undertake to procure the facts by a jury properly appointed,

and thus fix the basis upon which any future adjudication that might be required, or seemed to be justified, might be had. I think that is as far as the resolution ought to go. It leaves the question of adjustment for a later date, to be determined by subsequent events.

In other words, the question as to whether it is to be confiscation or requisition is not to be settled now. I do not think it ought to come up now. The question ought to be reserved for later consideration, because as has been so frequently stated we do not know all the elements that may be involved.

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Continuing at page 1932:

Mr. STEVENSON. But they were given the benefit, or, rather, exculpated of being guilty of treason, because acting in concert under the command of their superior officer was not a conspiracy such as acting in concert by their own agreement.

Mr. FESS. Just to recapitulate very briefly. Many questions that are in doubt must be adjusted later on. In the first place, just the force of the treaties now obtaining is not entirely clear, to say nothing about Germany's conduct toward us in the light of past treaties. What those treaties are—there were three of them, and whether one is a supplement of the other or one supersedes the other is not clear. Whether those parts in the treaties of 1785 and 1799 not included in that of 1828 are void it is not certain. That will have to be adjudicated later on. Secondly, just the effect of war upon treaties that were not made with specific reference to a state of war but to regulate commercial rights is the question that must be

adjudicated later on, and can not now be done. It is a question whether in the absence of provision otherwise a war does not abrogate treaty obligations. Another question is whether Germany has not by her conduct toward us repudiated the treaty obligations toward her. Still another question is whether these ships can be considered under such ownership or control of the German Government that they might be called public ships. We do not know, although strong evidence points that way. If they were, confiscation is clear. Another question is whether in the destruction of those vessels it was an act of the German Government because she feared they would be utilized in favor of her enemy. Later on that must be considered and can not be at this time adjudicated. There are so many questions that have come up that I am perfectly willing and shall freely vote to take these vessels, their title and possession, with the understanding that the Government is to operate or lease them or charter them and equip them, and then I hope that our Government, following the second section here, will proceed upon the basis that all rights of all people and of all citizens, of whatever nationality, will be regarded and respected, for our Government is too big to do anything else. [Applause.]

We have every reason, it seems to me, to employ our right in the premise. I feel quite certain the President has the authority to seize them without an act of Congress. However, I should prefer that our Government shall proceed upon the higher plane of public announcement that in our dealings even with an enemy and in time of war we will endeavor to secure every right to all citi-

zens, even though they are citizens of an enemy country.

Mr. GREENE of Massachusetts. Mr. Chairman, I yield eight minutes to the gentleman from Pennsylvania [Mr. McFadden].

Mr. MCFADDEN. Mr. Chairman, the gentleman from Wisconsin [Mr. Lenroot] and the gentleman from Ohio [Mr. Fess], who have preceded me, I think have both raised a very important, if not the most important, issue here in connection with this bill. That is the question as to whether or not by the action of the German Government in ordering the crippling of the machinery of these 91 boats in our ports the title to these vessels did not transfer to the German Government by this very act, and whether, if the German Government ordered the destruction of these boats, it might not be conclusive proof that the German Government itself did by this very action confiscate these boats from the private ownership. I really believe, then, that if they did that we are fully justified in confiscating these boats, as in so doing we would be taking the property of the German Government and not the property of private owners or individuals. If, on the other hand, the real ownership of these boats is not vested in the German Government, I am interested just to the extent to see that confiscation of private property is not had by this Government without some basis of settlement being provided for eventually. I do not say at this time, but eventually, but believe the law should be made very specific now; and in that connection I want to quote a statement which was made by the State Department, with the authority

of the President, on February 8, 1917, in which it stated:

> The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and the subjects of foreign States.

Then I also want to quote from the President's message to this Congress on April 2, in which he said this:

> Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.
>
> It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus.

This is a war measure and warranted by the exigencies of the case; but, however grave the situation, shipping that came to our ports in the legitimate prosecution of ocean traffic, the property of individuals and companies, should not be seized without rendering at the proper time just compensation therefor. The good name of our Republic demands that such a provision be incorporated in the bill.

This should not be left to the uncertainties of the future without a word indicating our disposition to treat the matter fairly.

* * * * *

I shall, therefore, vote for the passage of this bill, with the full anticipation that if the act of the German Government in the ordering of the crippling of these boats is regarded under international law as confiscation by the German Government of the property of their own citizens, namely, these seized boats, the United States is fully justified in confiscating them, and need not make any settlement therefor; but, on the other hand, if it is finally determined that these boats are the property of individual citizens of Germany, after the war is over that prompt and full settlement will be provided for to the individual citizen.

This will thus remove any argument which might be used by the Government of Germany in persuading their people to enmity against the United States by pointing to this ship seizure as an illegal act of international law. [Applause.]

* * * * *

At page 1935:

Mr. BORLAND. Mr. Chairman, I move to strike out the last word. I did not have the opportunity to speak in general debate, or, at least, I surrendered the reservation of time that I had. I want to say that I trust there will be no demand to amend this bill in regard to the taking possession of the vessels. For my own part, I think that we could well provide in the bill for the payment of any possible interest that an American citizen has in the ships, and so provide at the time. But I want to clear up, if I may, in the mind of my friend from Wisconsin, who is unquestionably right on the broad principle of international law, the legal aspect of this situation in this act of

Congress. It would be utterly impossible for us to provide in this kind of a measure for the compensation to alien enemies. All we could do would be to announce a policy or make a recitation of future intention, which is sometimes a dangerous thing to do.

I take it that the gentleman from Wisconsin [Mr. Stafford] does not simply want that, but he will recognize instantly himself how impossible it is from a legal standpoint to safeguard the rights of an alien enemy. Assuming, as I know he does, that we have an indisputable right to seize these ships, and that it is our duty under the circumstances to do so, the question of the future compensation to a possible alien owner must be left to the future policy of the Government. It was provided in section 3 of the original bill that an American citizen should have the right of action against his own Government for compensation. That is a matter of grace, because under the general rule of law a sovereignty can not be sued without its own consent; but I have never seen a case where sovereignty submitted to be sued by a friend, even an alien friend. It is impossible to imagine a case where an alien enemy would have a right to go into the courts of the country during the continuance of a war.

Does the gentleman really expect that some provision might be made giving these alien enemies a legal right at this time? The entire provision will be a mere declaration of future intentions, which, as I say, would not only be futile, but in some cases dangerous.

Mr. STAFFORD. Is the gentleman aware that under existing statutes foreigners may present

claims against the Government in the Court of Claims if the same reciprocal rights are granted to citizens of our country in other countries?

Mr. BORLAND. I have no doubt there are such cases.

Mr. STAFFORD. It is the law; it is not a matter of cases.

Mr. GORDON. But there is no law authorizing an alien enemy to sue in the Court of Claims.

Mr. BORLAND. No; and there never was. I think the gentleman from Ohio is unquestionably right. These claims must be left to the adjudication of the peace commission upon the conclusion of peace, and it is impossible to exclude at that time the question of our reciprocal rights against the Government of that particular subject who claims that we have injured it. It may turn out that we shall insist upon Germany paying the claims of her own citizens. There have been three cases in this country where the United States has assumed as a matter of treaty the payment of spoliation claims to its own citizens. First, there was the French spoliation claims; second, the Spanish spoliation claims; and, third, the Mexican. It may easily happen, and I think will happen, that we shall insist upon Germany treating solely with her own citizens with regard to any spoliation claims.

* * * * *

The Clerk concluded the reading of the joint resolution.

At page 1936:

Mr. ALEXANDER. Mr. Chairman, I move that the committee do now rise and report the joint reso-

lution to the House with the recommendation that the same do pass.

The motion was agreed to.

Accordingly the committee rose; and the Speaker having resumed the chair, Mr. Booher, Chairman of the Committee of the Whole House on the state of the Union, reported that that committee had had under consideration Senate Joint Resolution 42 and had directed him to report the same back to the House without amendment and with the recommendation that the joint resolution do pass.

Mr. ALEXANDER. Mr. Speaker, I move the previous question on the joint resolution.

The previous question was ordered.

The joint resolution was ordered to be read the third time, was read the third time, and passed.

On motion of Mr. Alexander, a motion to reconsider the vote by which the joint resolution was passed was laid on the table.

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Nos. 3, 4 and 5

In the Supreme Court of the United States

OCTOBER TERM, 1927

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT

v.

THE UNITED STATES.

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT

v.

THE UNITED STATES.

ATLAS LINE STEAMSHIP COMPANY, APPELLANT

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEFS FOR THE UNITED STATES

U. S. GOVERNMENT PRINTING OFFICE : 1928

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No. 3

Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 3

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION Company, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the Court of Claims adopting the opinion in *Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant,* v. *The United States,* No. 12, October Term, 1927 (R. 12), is reported in 59 Ct. Cls. 461.

JURISDICTION

The judgment of the Court of Claims to be reviewed was entered March 17, 1924. (R. 12.) A motion for a new trial was entertained and denied May 26, 1924. (R. 19.) Application for appeal was filed June 4, 1924, and allowed June 16, 1924 (R. 20), pursuant to Sections 242 and 243 of the Judicial Code as they stood prior to the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The United States took and held possession from April 6, 1917, to June 28, 1918, of docks and piers belonging to a New Jersey corporation, whose stock was owned by an alien enemy, the possession having been taken pursuant to the Act of August 29, 1916, authorizing the President in time of war to take possession of systems of transportation, and the question is whether the New Jersey corporation's property had the status of enemy property because the shares issued by that corporation were all owned by an enemy, or whether the corporation is entitled to the same treatment as a citizen and to compensation, on an implied contract, for the value of the use of this property.

The United States took the title to these docks and piers on June 28, 1918, pursuant to the Act of March 28, 1918, which expressly provided for compensation to be determined by the President. The question on this branch of the case is whether the compensation awarded by the President included interest on the value of the property from the date of the taking to the date of payment, and if not, whether the Court of Claims had jurisdiction to award compensation.

THE STATUTES

The statute under which possession was taken and held from April 6, 1917, to June 28, 1918, was the Act of August 29, 1916 (c. 418, 39 Stat. 619, 645; U. S. C. Title 10, Sec. 1361), which is as follows:

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The Act of March 28, 1918 (c. 28, 40 Stat. 459), authorizing the taking of title to this property, contains the following provision:

> The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: *Provided,* That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken

over shall immediately vest in the United States: *Provided further,* That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired.

STATEMENT

In this case recovery is sought by a New Jersey corporation, all of the stock of which was owned by an enemy corporation, for the value of the use of piers and terminal properties, possession of which was taken and held by the United States for the period from April 6, 1917, to June 28, 1918, for which it is alleged no compensation has ever been paid. Recovery is also sought for interest on the amount of an award of compensation for the taking of the title from the date of acquisition of title by the United States, June 28, 1918, to the date of payment of the award, January 5, 1919. The most important question in the case is whether a domestic corporation, all of whose stock is owned by an enemy corporation, is entitled to the same treatment as a citizen, or whether its property is properly considered enemy property.

The case was disposed of on demurrer to the petition.

The petition in this case alleged that plaintiff was and is a New Jersey corporation organized in 1899 (R. 1), and that it is and always has been a

subsidiary of the Hamburg-American Line, a German corporation, and that all of its issued stock is and always has been owned by the Hamburg-American Line (R. 1); that the outstanding shares of stock of the terminal company held by the Hamburg-American Line were in December, 1917, seized and taken over by the Alien Property Custodian under the Trading with the Enemy Act, and that the present officers and directors of the terminal company were placed in office through the voting power of the Alien Property Custodian (R. 1–2). It is alleged that the terminal company owned wharves, docks, and piers in Hoboken; that on April 6, 1917, the United States entered upon this property, and on April 20, 1917, made its entry exclusive by ejecting the terminal company, and from April 20, 1917, until the United States acquired title to the property on June 28, 1918, the Secretary of War, under the direction of the President and pursuant to the Act of August 29, 1916, retained its use and possession. (R. 2.) The petition further alleges the acquisition of title to the property by the United States on June 28, 1918, by proclamation of the President under the Act of March 28, 1918, and the award of compensation of the value as of June 28, 1918, and the payment of that compensation on January 5, 1919. (R. 2–3.) It is alleged that no compensation for the use of the property was paid for the period from April 6, 1917, to June 28, 1918. (R. 3.) There is no

allegation that the award by the President of December 3, 1918, did not include interest from June 28th to December 3d. (R. 3.) As to the amount found as the value on June 28th (R. 3), the petition assumes, without any allegation to that effect, that the compensation awarded by the President was the value as of June 28th, and was without any allowance for the delay in payment of the award. The relief sought is the value of the *use* from April 6, 1917, to June 28, 1918, and interest on the amount awarded for the *title* to the property for the period from June 28th, the date of the taking, to January 5, 1919, the date of the payment of the award. (R. 4.)

The Proclamation dated June 28, 1918 (40 Stat. 1804), was as follows:

> *Whereas* the Act of Congress making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public—No. 109—65th Congress), contains the following provisions:
>
> "The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem

it necessary for the national security and defense: *Provided,* That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States: *Provided further,* That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired."

Now, therefore, I, Woodrow Wilson, President of the United States of America, pursuant to the authority vested in me by the said Act of Congress approved March 28, 1918, do hereby determine and declare that the acquisition of title to the foregoing docks, piers, warehouses, wharves, and terminal equipment and facilities, is necessary for the National security and defense, and I do hereby take over for the United States of America the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto.

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Just compensation for the property hereby taken over will be hereafter determined and paid.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this twenty-eighth day of June, one thousand nine hundred and eighteen, and of the Independence of the United States, one hundred and forty-two.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State.

The second Proclamation, awarding compensation, dated December 3, 1918 (40 Stat. 1914), is as follows:

Whereas the Act of Congress making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public—No. 109—65th Congress), contains the following provisions: (Here follows a copy of the Act of Congress.)

And whereas, pursuant to the authority vested in the President by said Act of Congress, approved March 28, 1918, the President by a proclamation duly made on the 28th day of June, 1918, determined and declared that the acquisition of title to the foregoing docks, piers, warehouses,

wharves, and terminal equipment and facilities was necessary for the national security and defense, and did thereby take over for the United States of America the immediate possession and title thereof, including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto; a more particular description of which said property is set forth in the schedule marked "A" hereto annexed;

And whereas, pursuant to the authority vested in the President by said Act of Congress, approved March 28, 1918, it was in and by said proclamation of June 28, 1918, expressed and declared that just compensation for the property thereby taken over would be thereafter determined and paid;

Now, therefore, I, Woodrow Wilson, President of the United States of America, pursuant to the authority vested in me by the said Act of Congress, approved March 28, 1918, do hereby determine and declare that the just compensation for the property in and by said proclamation of June 28, 1918, expropriated for the United States of America is the sum of seven million, one hundred and forty-six thousand, five hundred eighty-three dollars ($7,146,583); and I do hereby order and direct that compensation for the same, aggregating said amount of $7,146,583, be made out of the money appropriated by the act approved December 15, 1917, entitled "An Act Mak-

ing appropriations to supply deficiencies in appropriations for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," continuing and making available until June thirtieth, nineteen hundred and eighteen, the appropriation of $100,000,000 "for the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President," contained in the general deficiency appropriation Act approved April seventeenth, nineteen hundred and seventeen, to the parties and in the amounts set forth in the schedule marked A, hereto annexed; any part of the sum to be paid for which that appropriation does not suffice to be paid out of the similar appropriation for the fiscal year 1919.

And I do hereby further order, direct and require under the authority delegated to me by Section 6, subsection c, of the trading with the enemy Act, approved October 6, 1917, that the sum of money specified in said schedule which I determined to be payable to the North German Lloyd, a corporation of the Free and Hanseatic City of Bremen in the German Empire, be paid over to the Alien Property Custodian appointed under the provisions of said trading with the enemy Act, the same to be held by him subject to the provisions of said act.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this third day of December, in the year of our Lord one thousand, nine hundred and eighteen, and of the Independence of the United States the one hundred and forty-third.

WOODROW WILSON.

By the President,
ROBERT LANSING,
Secretary of State.

Schedule A, attached to the proclamation of December 3, 1918, contains the following (40 Stat. 1914, 1916):

To the Hamburg-American Line Terminal & Navigation Company, a corporation of the State of New Jersey, the sum of two million, three hundred fourteen thousand, eight hundred and seventy-seven dollars ($2,314,877), to be paid to said Hamburg-American Line Terminal & Navigation Company upon the satisfaction of record of all liens by way of mortgage, judgment or otherwise existing on, and all taxes and assessments due and exigible upon the foregoing premises, or any part thereof, on the 28th day of June, 1918.

SUMMARY OF ARGUMENT

I. If Congress intended that the property of the New Jersey corporation should be dealt with as enemy property because of the enemy ownership of the shares of stock, the Court of Claims was right in holding that no implied contract arose to pay compensation for the use of the docks and piers; but Congress appears to have adopted the policy of

determining the status of corporations as enemy or not by the place of incorporation and not the nationality of the shareholders. No doubt Congress has power to provide that property of a domestic corporation shall be treated as enemy owned where all the shares of the domestic corporation are enemy owned, but we do not think it has done so here. Its legislative policy has been to provide for seizure of the enemy-owned shares of domestic corporations and not the seizure as enemy owned of the property of such corporations. In this respect the United States does not attempt to sustain the judgment below. If this view be accepted, the appellant is entitled to compensation for the use of its docks and piers from the date possession was taken April 6, 1917, to the date title was taken, June 28, 1918.

II. The claim for interest on the award of compensation for the taking of the title of the docks and piers must be rejected. There is nothing on the face of the award by the President or in the petition in the Court of Claims to suggest that any item of just compensation was omitted or that the President in awarding to the appellant on December 3, 1918, the sum of $2,314,877, as just compensation for the property taken, did not take into account the delay in making payment.

If the President had awarded only the value at the date of taking without interest to the date of payment, the Court of Claims could not award addi-

tional compensation, because the statute authorizing the taking of title expressly provided that the compensation should be fixed by the President, and since all of the shares of the corporation were enemy owned, and Congress had power to treat the corporation's property as enemy owned, and the United States had the right of a belligerent to seize private property of alien enemies without making any compensation, it had the right to commit the determination of compensation to the President and make his action final.

ARGUMENT

I

BY THE STATUTE AUTHORIZING THE TAKING OF THE USE OF THE DOCKS AND PIERS, CONGRESS DID NOT DISCLOSE AN INTENTION THAT THE PROPERTY OF DOMESTIC CORPORATIONS SHOULD BE TREATED AS ENEMY-OWNED BECAUSE OF THE NATIONALITY OF THE STOCKHOLDERS.

There were originally twelve of these so-called German Ship Cases. Nine of them have been dismissed by appellants because of the enactment of the Settlement of War Claims Act approved March 10, 1928. In the nine cases dismissed, title to the property taken belonged at the time of seizure to alien enemies. In the three cases not dismissed, of which this is one, a special situation is found. In them the property seized belonged to corporations organized under the laws of States of this Union, all of the shares of which were enemy-owned, and the

question arises whether Congress intended that the property of such domestic corporations should be treated as having the status of enemy-owned property or that compensation should be paid as if the property were owned by a citizen or an ally.

Only one opinion was written by the Court of Claims in disposing of the twelve cases, and that was in *Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant,* v. *The United States,* No. 12, October Term, 1927, set forth in the record in this case at page 13. The Court of Claims makes no mention of the question here considered, but the record in the Court of Claims discloses that the United States contended there that the property of the New Jersey corporation should be treated as the property of an enemy because all of the issued stock belonged to an enemy corporation. The Court of Claims evidently accepted that view, although not mentioning the point in its opinion. The authorities cited by the United States in the Court of Claims in support of this contention are certain English Prize Cases.

In the case of the *St. Tudno,* Lloyd's Reports of Prize Cases, Vol. V, p. 198, the following appears:

> A steamship [the *St. Tudno*], of which the registered owners were a British company, was before the war used as a tender at Southampton to the vessels of the Hamburg-Amerika Linie. She had been bought in 1912 by the Hamburg-Amerika Linie, who caused her to be transferred to the British

company, by whom she was in form chartered for five years to the Hamburg-Amerika Linie. All the shareholders were nominees of the Hamburg-Amerika Linie, who appointed the directors, gave them their qualifications, and took from them blank transfers of their qualifying shares, and an agreement to conform to the instructions of the Hamburg-Amerika Linie and account to the latter for all dividends. Soon after the outbreak of war the vessel was requisitioned as a British ship by the Admiralty, in whose employment she was at the time of seizure.

Held that even if all the circumstances had been known to the Admiralty (which they were not), the fact that she was under requisition was immaterial, that the beneficial ownership was vested in the Hamburg-Amerika Linie, and that she must be regarded as enemy property * * *. (Pp. 198–199.)

The court, speaking through the President, says:

In this case the Crown asks for the condemnation of a paddle steamer, the *Saint Tudno,* which, up to the time of the outbreak of war between this country and Germany, was at all material times used as a tender in or about Southampton for the liners of the Hamburg-Amerika Linie. The claim of the Crown is grounded on the contention that this steamer was enemy property, and that is the question which I have to determine in this case.

* * * * *

> The steamship belonged nominally to a British company registered in this country. In my opinion, in this Court of Prize, I have a right to look, and am bound to look, at something beyond the nominal ownership. The British company had, I think, three British directors and some British shareholders; but the documents which are now before me show clearly what the position of those directors, as directors, was, and what the position of those gentlemen as shareholders was. (Pp. 204–205.)
>
> * * * * *
>
> Now, apart from technicalities, could anybody say that this ship belonged to a British company? If it did in name belong to a British company, that covering was the merest thinnest shell, and I must break through it, as I do break through it, in order to ascertain who the real owners of the ship were. There can be no doubt that the real owners are the Hamburg-Amerika Linie; and if the ship earned during the period of war (as it has earned up till now) considerable sums, all those sums would have to be accounted for to that enemy company. (Pp. 207–208.)

The same doctrine is stated in the case of the *Michigan* (Lloyd's Reports of Prize Cases, Vol. V, p. 421):

> All the shares in a company registered in Great Britain were held by a German corporation, except six registered in the names of the directors and secretary of the com-

pany, all German subjects, and of a French employee of the corporation, resident before the war in Germany.

Held that goods belonging to the British company were liable to be condemned as enemy property.

The judgment concludes with the following words (p. 423):

> I hold that this company for all purposes affecting this case must be regarded as an enemy company, although carrying on business here, and the property must be condemned as enemy property.

In the case of *Daimler Company* (*Limited*) v. *Continental Tyre and Rubber Company* (*Great Britain*) (*Limited*), decided in the House of Lords June 30, 1916, 2 A. C. (1916) 307 (Times Law Reports, Vol. XXXII, pp. 624, 626), Lord Halsbury uses the following language (p. 316):

> The limited liability was a very useful introduction into our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefits of that institution, but it seems to me too monstrous to suppose that for an unlawful, because, after a declaration of war, a hostile, purpose the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English Court of justice.

These English cases do not necessarily dispose of the question here.

Congress without doubt has the power to provide that property of a domestic corporation shall be treated as enemy-owned where all of the stock of the domestic corporation is owned by an enemy.

The English cases are authority for the proposition that a government may look through the form of corporate organization to the beneficial ownership when determining whether property is enemy-owned, but the question in the United States is one of legislative intention as disclosed by our own legislation on this subject. For very practical reasons and to avoid confusion in the application of laws dealing with enemy property, Congress has adopted the policy of treating the property of domestic corporations as not enemy property, regardless of the nationality of the shareholders, and has preferred the method of seizing the shares of stock as enemy-owned rather than of treating the property of the corporation as enemy-owned.

In the Trading With The Enemy Act, approved October 6, 1917 (c. 106, 40 Stat. 411), in Section 2, subdivision (a), an enemy was defined as including—

> any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

In *Behn, Meyer & Co.* v. *Miller, Alien Property Custodian*, 266 U. S. 457, decided January 5, 1925, after the decision of the Court of Claims in this case, the Court held that under the Trading With The Enemy Act the status of a corporation was not fixed by the nationality of its stockholders and said (p. 472):

> Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2 A. C. (1916) 307 * * *.

The Trading With The Enemy Act was constructed on the theory that in a case like the present the enemy-owned shares of the domestic corporation should be seized by the Alien Property Custodian, not the property of the corporation itself, and that is the course which was followed in the case of the appellant. In dealing with corporations Congress thus definitely adopted the policy of disregarding stock ownership as a test of enemy character, and the petition discloses that the shares of stock of the appellant, formerly owned by the Hamburg-American Line, an enemy corporation, were seized by the Alien Property Custodian in December, 1917. The intention of Congress on this subject is made evi-

dent in the statute known as the Settlement of War Claims Act of 1928, approved March 10, 1928, the pertinent provisions of which are printed in the appendix to this brief. That Act provides for the return of or compensation for enemy property seized by the Alien Property Custodian, but it also specially provides for adjustment through a war claims arbiter and payment for the merchant vessels which were involved in the nine other German ship cases and some other property not seized by the Alien Property Custodian under the Trading with the Enemy Act, but seized under other statutes by other officials of the United States. It nowhere provides for the determination or payment of compensation for property owned by domestic corporations the shares of which were enemy owned. Since it discloses an intention to return or pay compensation for all private property of alien enemies seized during the war, the omission of provisions which would authorize domestic corporations, the shares of which were enemy owned, to recover compensation for corporate property seized by the United States can only be explained on the theory that Congress has intended that such corporations shall be treated as citizens and that compensation for their property taken shall be awarded in the courts if no special provision has otherwise been made.

Section 3(b) of that Act provides that it shall be the duty of the arbiter "to hear the claims of any German national as hereinafter defined." Section

22 of the Act, in defining German nationals, includes—

> A partnership, association, or corporation, which, on April 6, 1917, was organized or created under the law of Germany—

thus excluding appellant in this case.

If compensation for the use of these piers may not be recovered in this action, then no compensation is recoverable without further legislation.

It may be added that the Department of Justice brought to the attention of those having charge of this legislation in Congress the situation presented by these three cases, with the suggestion that the legislation expressly provide for award of compensation by the arbiter, to dispose of these cases and remove the necessity for their consideration by this Court, but we understand that such provisions were deliberately omitted from the Act because they would have complicated it and because it was supposed that the domestic corporations in these three cases are in a position to recover compensation in the courts.

If this Court accepts the judgment of the Court of Claims that the property of appellant is to be treated as enemy-owned when the possession of the docks and piers were taken, then no recovery may be had for the value of that use because no express provision was made in the Act of August 29, 1916, for compensation and no obligation exists to pay

compensation for private property of alien enemies seized in time of war.

Ware v. *Hylton*, 3 Dall. 199.
Brown v. *United States*, 8 Cranch 110.
Miller v. *United States*, 11 Wall. 268.

On the other hand, if the nationality of the shareholders did not fix an enemy status on the property of these domestic corporations, an implied contract arose to pay compensation for the use of the docks and piers, use of which was retained without compensation from April 6, 1917, to June 28, 1918, the date when the title was taken.

II

THE COMPENSATION AWARDED BY THE PRESIDENT FOR THE TAKING OF THE TITLE TO THE DOCKS AND PIERS JUNE 28, 1918, WAS ADEQUATE AND JUST AND THE COURT OF CLAIMS HAS NOT JURISDICTION TO REVIEW HIS AWARD

The title to these docks and piers was taken June 28, 1918. The award of compensation by the President was made December 3, 1918. The appellant contends that the sum fixed as just compensation by the President was the value of the property at the date of the taking, June 28, 1918, and did not take into account as part of just compensation interest on that value to the date of the award. The short answer to that contention is that there is nothing on the face of the award which supports the contention. The award does not state that the

amount awarded was merely the value as of the date of the taking. The sum stated was that determined by the President to be "just compensation," and there is no allegation in the petition in the Court of Claims that the amount awarded as just compensation December 3, 1918, was merely the value of the property on June 28. The delay in payment from December 3, 1918, to January 5, 1919, may have been to allow the title to be cleared and liens discharged. Aside from that, it appears that the title was taken pursuant to the Act of March 28, 1918 (c. 28, 40 Stat. 459), which expressly authorized the President to acquire the docks and piers of the Hamburg-American Line Terminal & Navigation Company. This Act had provided that the United States "shall make just compensation therefor to be determined by the President." The Act gave to the President the exclusive power to determine compensation and has not granted jurisdiction to the Court of Claims to review his decisions. Since all of the shares of the appellant were enemy owned and Congress had power, if it chose to exercise it, to look beneath the corporate organization and treat the property of this corporation as enemy owned because of the enemy ownership of all of its shares, Congress had power to withhold compensation or to allow the President to fix it and make his decision final.

In so far as the Court of Claims refused to award any further compensation to the appellant for the

property taken in June, 1918, its decision was obviously correct.

CONCLUSION

If this Court concludes that the nationality of the shareholders of the domestic corporation determined the status of the corporation's property as enemy property, the judgment of the Court of Claims should be affirmed.

If it concludes that Congress intended, in so far as concerns the legislation authorizing the taking of the use of the docks and piers, that the status of the property should be determined by the place of incorporation, the judgment should be reversed with direction to ascertain just compensation for the use of the docks and piers from April 6, 1917, to June 28, 1918, if the appellant sustains the allegation in its petition that no such compensation has been paid.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1928.

No. 4

Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 4

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION Company, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the Court of Claims adopting the opinion in *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *The United States*, No. 12, October Term, 1927 (R. 12), is reported in 59 Ct. Cls. 461.

JURISDICTION

The judgment to be reviewed was entered March 17, 1924. (R. 12.) A motion for new trial was entertained and denied May 26, 1924. The application for appeal was filed June 4, 1924 (R. 20),

pursuant to Sections 242 and 243 of the Judicial Code, as they stood prior to the effective date of the Act of February 13, 1925.

THE QUESTION PRESENTED

The only question in this case is whether the property of a domestic corporation all the shares of which were enemy owned had the status of enemy property, or whether on the United States taking the property an implied contract arose, as in the case of a citizen, to pay compensation.

THE STATUTE

The Act under which the possession and use of appellant's property was taken is the Act of August 29, 1916, printed on page 3 of the brief in No. 3, authorizing the President in time of war to take possession and assume control of systems of transportation.

STATEMENT

The appellant in this case is the same corporation as the appellant in No. 3. It is a New Jersey corporation, all of the shares of which were at the time of the seizure of its property held and owned by the Hamburg-American Line, a German corporation. The case was disposed of in the Court of Claims on the demurrer to the complaint, the court holding, on the assumption that the appellant was an enemy corporation and its property had the status of enemy property, that its seizure did not give rise to an implied contract to pay com-

pensation, of which the Court of Claims had jurisdiction.

The petition alleged that the appellant was the owner of two tugboats, a launch, a barge, and a coal hoister, of the value of $184,124.66 (R. 2), and that on or about April 6, 1917, the United States requisitioned and took possession and control of this property pursuant to the Act of Congress of August 29, 1916, authorizing the President in time of war to take possession and assume control of systems of transportation, and that on April 17, 1917, the property was turned over by the Treasury officials, who had seized it, to the War Department, and that ever since the property has remained in the possession and use of the War Department of the United States. (R. 3.) The petition does not make it clear whether the title of the property was taken or merely its use, and recovery was sought for the reasonable value of the property or for the value of its use, although there was no allegation as to what the use was worth.

ARGUMENT

IF THE PROPERTY OF THE APPELLANT, A DOMESTIC CORPORATION, IS TO BE CONSIDERED ENEMY PROPERTY BECAUSE THE SHARES OF STOCK WERE ENEMY-OWNED, THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED; BUT IF THE CONTRARY VIEW IS ACCEPTED, ITS JUDGMENT SHOULD BE REVERSED

This case presents the same question as to the status of the property of a New Jersey corporation

the shares of which were all owned by an enemy as is dealt with in No. 3, above. What has been said under subdivision I in that brief is sufficient for the purposes of this case.

We suggest here, as in that case, that Congress had the power to treat the property of a domestic corporation the shares of which were enemy-owned as enemy property, but that the legislation on this subject discloses that its intention has been to treat the shares of such a corporation as enemy-owned property, but to deal with the corporate property as that of a citizen. If that be the law, the judgment of the Court of Claims should be reversed and the case remanded for an award of compensation for whatever was taken.

The petition in the Court of Claims leaves some matters in obscurity. It was alleged that the use of these vessels and also the title or ownership were seized and taken by the United States. The Act under which it is alleged the seizure took place authorized the President to take possession of systems of transportation during war. It did not authorize the taking of title, and in the absence of further legislation the right to retain the use would end after the termination of war.

There may have been some other statute not pleaded which authorized the taking of the title of these vessels.

These are matters which may be cleared up if the case is remanded to the Court of Claims, and need not be analyzed here.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1928.

No. 5

Atlas Line Steamship Company, Appellant, v. The United States

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 5

ATLAS LINE STEAMSHIP COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the Court of Claims adopting the opinion in *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *The United States*, No. 12, October Term, 1927 (R. 12), is reported in 59 Ct. Cls. 461.

JURISDICTION

The judgment to be reviewed was entered March 17, 1924. (R. 12.) A motion for a new trial was entertained and denied May 26, 1924. Application for appeal was filed June 4, 1924, and allowed June 16, 1924. (R. 19.)

THE QUESTION PRESENTED

The only question presented in this case is whether vessels belonging to a New Jersey corporation all of the shares of which were enemy-owned had the status of enemy property, so that on seizure by the United States no implied contract arose to pay compensation.

THE STATUTES

The statute under which it is alleged possession of the barges was taken is the Act of August 29, 1916, authorizing the President in time of war to take possession of systems of transportation. That statute is printed on page 3 of the brief in No. 3.

The statute under which the title to the barges is alleged to have been taken later, is the Joint Resolution of May 12, 1917 (c. 13, 40 Stat. 75), which is as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall

be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

STATEMENT

This case was disposed of by the Court of Claims on demurrer. The appellant is a corporation organized under the laws of New Jersey (R. 1), and at the time of the seizure of its property all of its outstanding shares were held and owned by the Hamburg-American Line, a German corporation, and an enemy. The German-owned shares were seized by the Alien Property Custodian in Decem-

ber, 1917 (R. 1), but the corporation's property here involved was taken in April, 1917.

The petition alleged that this appellant was the owner of three barges of the value of $14,250, and that on or about April 6, 1917, the United States requisitioned the barges, which were shortly thereafter turned over to the War Department for use of the Army transport service; that on June 30, 1917, the President, by an executive order, issued pursuant to the Joint Resolution of May 12, 1917, took title to the three barges, together with the other vessels enemy owned, and that no compensation has ever been paid for the use of the barges or for their value. Recovery is sought for the value of the barges as of the date they were taken possession of by the United States, April 6, 1917, with interest from that date. (R. 2–3.)

ARGUMENT

IF THE PROPERTY OF THE APPELLANT, A DOMESTIC CORPORATION, IS TO BE CONSIDERED ENEMY PROPERTY BECAUSE THE SHARES OF STOCK WERE ENEMY-OWNED, THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED; BUT IF THE CONTRARY VIEW IS ACCEPTED, ITS JUDGMENT SHOULD BE REVERSED

This case presents the same question as to the status of property of a domestic corporation the shares of which were enemy-owned, which is presented in No. 3, and what has been said in subdivision I of the brief in that case is applicable here. We think the property of this domestic corporation

should not be treated as enemy-owned because the shares of the corporation were owned by an enemy. Although in the Settlement of War Claims Act, approved March 10, 1928, provision has been made for compensation for merchant vessels seized by the United States which at the time of seizure were owned by enemy aliens or by corporations organized under the laws of enemy nations or organized in foreign countries and doing business in enemy territory, no provision has been made for compensation for these vessels which when seized were owned by a domestic corporation whose shares were enemy-owned, and unless recovery may be had in this proceeding no compensation may be recovered without further legislation. This confirms the view that Congress has not intended that the property of a domestic corporation should be treated as enemy property because of enemy ownership of its outstanding shares.

In this case title to these vessels was ordered by the President to be taken pursuant to the Joint Resolution of May 12, 1917, which authorized the taking of possession and title of vessels "owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war," or which flew the flag of or were under the registry of any such nation. The President in this case seems to have assumed that this appellant was a corporation of a nation with which the United States was at war, because of the enemy ownership

of its shares. The point was probably given little consideration at the time, as only three lighters were involved, of small value. We think that this appellant was not an enemy corporation within the meaning of the Joint Resolution of May 12, 1917.

If the appellant is to be treated as an enemy corporation at the time of this seizure, the judgment of the Court of Claims should be affirmed. If not considered as having that status, the judgment below should be reversed and the case remanded to the Court of Claims to award just compensation for the use prior to the taking of title and for the vessels themselves, if title was taken.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1928.

APPENDIX

SETTLEMENT OF WAR CLAIMS ACT OF MARCH 10, 1928

(Public No. 122, 70th Congress)

SEC. 3. (a) There shall be a War Claims Arbiter (hereinafter referred to as the "Arbiter"), who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to any provision of law prohibiting the holding of more than one office. The Arbiter, notwithstanding any other provision of law, shall receive a salary to be fixed by the President in an amount, if any, which if added to any other salary will make his total salary from the United States not in excess of $15,000 a year.

(b) It shall be the duty of the Arbiter, within the limitations hereinafter prescribed, to hear the claims of any German national (as hereinafter defined), and to determine the fair compensation to be paid by the United States, in respect of—

(1) Any merchant vessel (including any equipment, appurtenances, and property contained therein), title to which was taken by or on behalf of the United States under the authority of the Joint Resolution of May 12, 1917 (Fortieth Statutes, page 75). Such compensation shall be the fair value, as nearly as may be determined, of such vessel to the owner immediately prior to the time exclusive possession was taken under the authority

of such Joint Resolution, and in its condition at such time, taking into consideration the fact that such owner could not use or permit the use of such vessel, or charter or sell or otherwise dispose of such vessel for use or delivery, prior to the termination of the war, and that the war was not terminated until July 2, 1921, except that there shall be deducted from such value any consideration paid for such vessel by the United States. The findings of the Board of Survey appointed under the authority of such Joint Resolution shall be competent evidence in any proceeding before the Arbiter to determine the amount of such compensation.

(2) Any radio station (including any equipment, appurtenances, and property contained therein) which was sold to the United States by or under the direction of the Alien Property Custodian under authority of the Trading with the Enemy Act, or any amendment thereto. Such compensation shall be the fair value, as nearly as may be determined, which such radio station would have had on July 2, 1921, if returned to the owner on such date in the same condition as on the date on which it was seized by or on behalf of the United States, or on which it was conveyed or delivered to, or seized by, the Alien Property Custodian, whichever date is earlier, except that there shall be deducted from such value any consideration paid for such radio station by the United States.

(3) Any patent (or any right therein or claim thereto, and including an application therefor and any patent issued pursuant to any such application) which was licensed, assigned, or sold by the Alien Property Custodian to the United States. Such compensation shall be the amount, as nearly as

may be determined, which would have been paid if such patent, right, claim, or application had been licensed, assigned, or sold to the United States by a citizen of the United States, except that there shall be deducted from such amount any consideration paid therefor by the United States (other than consideration which is returned to the United States under section 27 of the Trading with the Enemy Act, as amended).

(4) The use by or for the United States of any invention described in and covered by any patent (including an application therefor and any patent issued pursuant to any such application) which was conveyed, transferred, or assigned to, or seized by, the Alien Property Custodian, but not including any use during any period between April 6, 1917, and November 11, 1918, both dates inclusive, or on or after the date on which such patent was licensed, assigned, or sold by the Alien Property Custodian. In determining such compensation, any defense, general or special, available to a defendant in an action for infringement or in any suit in equity for relief against an alleged infringement, shall be available to the United States.

(c) The proceedings of the Arbiter under this section shall be conducted in accordance with such rules of procedure as he may prescribe. The Arbiter, or any referee designated by him, is authorized to administer oaths, to hold hearings at such places within or without the United States as the Arbiter deems necessary, and to contract for the reporting of such hearings. Any witness appearing for the United States before the Arbiter or any such referee at any place within or without the United States may be paid the same fees and mile-

age as witnesses in courts of the United States. Such payments shall be made out of any funds in the German special deposit account hereinafter provided for, and may be made in advance.

(d) The Arbiter may, from time to time, and shall, upon the determination by him of the fair compensation in respect of all such vessels, radio stations, and patents, make a tentative award to each claimant of the fair compensation to be paid in respect of his claim, including simple interest, at the rate of 5 per centum per annum, on the amount of such compensation from July 2, 1921, to December 31, 1928, both dates inclusive. If a German national filing a claim in respect of any such vessel fails to establish to the satisfaction of the Arbiter that neither the German Government nor any member of the former ruling family had, at the time of the taking, any interest in such vessel, either directly or indirectly, through stock ownership or control or otherwise, then (whether or not claim has been filed by or on behalf of such Government or individual) no award shall be made to such German national unless and until the extent of such interest of the German Government and of the members of the former ruling family has been determined by the Arbiter. Upon such determination the Arbiter shall make a tentative award in favor of such Government or individual in such amount as the Arbiter determines to be in justice and equity representative of such interest, and reduce accordingly the amount available for tentative awards to German nationals filing claims in respect of the vessel so that the aggregate of the tentative awards (including awards on behalf of the German

Government and members of the former ruling family) in respect of the vessel will be within the amount of fair compensation determined under subsection (b) of this section.

(e) The total amount to be awarded under this section shall not exceed $100,000,000, minus the sum of (1) the expenditures in carrying out the provisons of this section (including a reasonable estimate for such expenditures to be incurred prior to the expiration of the term of office of the Arbiter) and (2) the aggregate consideration paid by the United States in respect of the acquisition of such vessels and radio stations, and the use, license, assignment, and sale of such patents (other than consideration which is returned to the United States under section 27 of the Trading with the Enemy Act, as amended).

* * * * *

(q) The provisions of this section shall constitute the exclusive method for the presentation and payment of claims arising out of any of the acts by or on behalf of the United States for which this section provides a remedy. Any person who files any claim or makes application for any payment under this section shall be held to have consented to all the provisions of this Act. This subsection shall not bar the presentation of a claim under section 21 (relating to the claims of certain former German nationals in respect of the taking of the vessels *Carl Diederichsen* and *Johanne*); but no award shall be made under section 21 in respect of either of such vessels to or on behalf of any person to whom or on whose behalf an award is made under this section in respect of such vessel.

SEC. 21. (a) It shall be the duty of the Arbiter to hear the claims of any partnership, association, joint-stock company, or corporation, and to determine the amount of compensation to be paid to it by the United States, in respect of the merchant vessels *Carl Diederichsen* and *Johanne* (including any equipment, appurtenances, and property contained therein), title to which was taken by or on behalf of the United States under the authority of the Joint Resolution of May 12, 1917, and which were subsequently sold by or on behalf of the United States. Such compensation shall be determined as provided in paragraph (1) of subsection (b) of section 3 of this Act, but the aggregate compensation shall not exceed, in the case of the *Carl Diederichsen*, $166,787.78 and in the case of the *Johanne*, $174,600 (such amounts being the price for which the vessels were sold, less the cost of reconditioning). The Arbiter shall not make any award under this section in respect of the claim of any partnership, association, joint-stock company, or corporation unless it appears to his satisfaction that all its members and stockholders who were, on April 6, 1917, citizens or subjects of Germany, became, by virtue of any treaty of peace or plebiscite held or further treaty concluded under such treaty of peace, citizens or subjects of any nation other than Germany, and that all its members and stockholders on the date of the enactment of this Act were on such date citizens or subjects of nations other than Germany.

* * * * *

(d) The provisions of this section shall constitute the exclusive method for the presentation and payment of claims arising out of any of the acts by or on behalf of the United States for which this

section provides a remedy. Any person who files any claim or makes application for any payment under this section shall be held to have consented to all the provisions of this Act. This subsection shall not bar the presentation of a claim under section 3 (relating to the ship claims of German nationals) in respect of the taking of the vessel *Carl Diederichsen* or the vessel *Johanne;* but no award shall be made under section 3 in respect of either of such vessels to or on behalf of any person to whom or on whose behalf an award is made under this section in respect of such vessel.

SEC. 22. As used in this Act—

(a) The term "person" means an individual, partnership, association, or corporation.

(b) The term "German national" means—

(1) An individual who, on April 6, 1917, was a citizen or subject of Germany, or who, on the date of the enactment of this Act, is a citizen or subject of Germany.

(2) A partnership, association, or corporation, which, on April 6, 1917, was organized or created under the law of Germany.

(3) The Government of Germany.

(c) The term "member of the former ruling family" means (1) any person who was at any time between April 6, 1917, and July 2, 1921, the German Emperor or the ruler of any constituent kingdom of the German Empire, or (2) the wife or any child of such person.

(d) The term "Austrian national" means—

(1) An individual who, on December 7, 1917, was a citizen of Austria, or who, on the date of the enactment of this Act, is a citizen of Austria.

(2) A partnership, association, or corporation which, on December 7, 1917, was organized or created under the law of Austria.

(3) The Government of Austria.

(e) The term "Hungarian national" means—

(1) An individual who, on December 7, 1917, was a citizen of Hungary, or who, on the date of the enactment of this Act, is a citizen of Hungary.

(2) A partnership, association, or corporation which, on December 7, 1917, was organized or created under the law of Hungary.

(3) The Government of Hungary.

(f) The term "United States" when used in a geographical sense includes the Territories and possessions of the United States and the District of Columbia.

O

SUPREME COURT OF THE UNITED STATES.

Nos. 3, 4, 5.—October Term, 1927.

Hamburg-American Line Terminal & Navigation Company, Appellant,
vs.
The United States.

Hamburg-American Line Terminal & Navigation Company, Appellant,
vs.
The United States.

Atlas Line Steamship Company, Appellant,
vs.
The United States.

Appeals from the Court of Claims.

[May 14, 1928.]

Mr. Justice McReynolds delivered the opinion of the Court.

These appeals were taken June 16, 1924, from judgments of the Court of Claims which sustained demurrers to the petitions. For the views of that Court see *Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant* v. *The United States*, 59 Ct. Cls. 461. Appellants are incorporated under the laws of New Jersey and their entire capital stock has long been owned by the Hamburg-American Line, a German corporation.

In Cause No. 3 the appellant seeks to recover (1) compensation for the use of certain docks and piers, New York harbor, seized by the United States April 6, 1917, and used by them until June 28, 1918; and (2) interest on the sum awarded by the President (December 3, 1918) as compensation for the same property, from June 28, 1918, when title was taken thereto until January 5, 1919, the date of actual payment. In Cause No. 4 the claim is for the value of two tug-boats, launch, barge, and coal hoister requisitioned and taken by the United States April 6, 1917, at the port of New

York; and in No. 5 judgment is asked because of three barges, likewise taken on the same day.

The court below evidently proceeded upon the view that the property of appellant corporations should be treated as owned by an enemy because their entire capital stock belonged to a German corporation. And as the property was seized during the war with Germany it held there could be no recovery. Without doubt Congress might have accepted and acted upon that theory. It was adopted in the *St. Tudno*, Lloyd's Reports of Prize Cases, Vol. V, p. 198, and the *Michigan*, Lloyd's Reports of Prize Cases, Vol. V, p. 421. But Congress did not do so; it definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy. The prescribed plan was to seize the shares of stock when enemy owned rather than to take over the corporate property.

The Trading With The Enemy Act, approved October 6, 1917 (c. 106, 40 Stat. 411), provides—

> Sec. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. . . .

In *Behn, Meyer & Co.* v. *Miller, Alien Property Custodian*, (January 5, 1925) 266 U. S. 457, we held the status of the corporation was not fixed by the stockholders' nationality, and said—

> Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse

opinions in *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2 A. C. (1916) 307. . . .

The petition in No. 3 states a good cause of action for the use of the docks and piers from April 6, 1917, to June 28, 1918. As Congress might have directed forfeiture of all property beneficially owned by enemy subjects, it had power to provide for seizure followed by such compensation as the President might determine. Here such compensation was fixed and ultimately paid; and we find nothing to show that due allowance was not made for the delay in payment.

In No. 4 the petition fails clearly to show what action was taken by the United States. It does allege that the property was taken and used and to that extent discloses adequate ground for recovery. It ought to be made more certain by amendment.

If title to the vessels described in Cause No. 5 was actually taken, the United States became liable for their value. For any use of such vessels before acquisition of title the United States should pay. The allegations of the petition are not entirely clear and should be made more definite.

The judgments appealed from are reversed. The causes will be remanded to the Court of Claims for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.